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IN THE

Supreme Court of the United States

THE CONSUL GENERAL FOR THE REPUBLIC OF POLAND IN CHICAGO and GREGORY A. MADEJ,

Petitioners,

v.

ILLINOIS, JAMES M. SCHOMIG, Warden, Pontiac Correctional Center, DONALD P. O'CONNELL, Chief Judge of the Circuit Court of Cook County, and THE CIRCUIT COURT OF COOK COUNTY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

The Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. (the "Vienna Convention") does not expressly provide a remedy for breach of its provisions; instead, it provides that "the rules of customary international law continue to govern matters not expressly regulated by the provisions of the present Convention." The questions presented are:

1. When a sovereign nation and its national both seek relief from convictions and a death sentence obtained after an admitted violation of the consular notification provisions of the Vienna Convention:

A. Does the decision of a bare majority of the Illinois Supreme Court to rely upon Illinois law to determine the appropriate remedy violate the Supremacy Clause?

B. Does customary international law require annulment of the convictions and death sentence obtained in violation of the Vienna Convention?

C. Are the convictions and death sentence subject to automatic reversal, or are they subject to harmless error review under the standards enunciated in *Strickland v. Washington*, 466 U.S. 668 (1984) and *Arizona v. Fulminante*, 499 U.S. 279 (1991)?

2. Whether time-barring a sovereign nation and its national from seeking relief from a judgment entered in violation of the Vienna Convention, under a limitations period that expired fourteen years before the nation received notice of that judgment, violates the Due Process Clause, Article 36(2) of the Vienna Convention or applicable international law.

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The Consul General for the Republic of Poland in Chicago (the "Consul General") and Gregory Madej (collectively, "Petitioners") respectfully petition for a writ of certiorari to review the Illinois Supreme Court's decision denying their petitions seeking relief from the State of Illinois' admitted violation of the Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 (the "Vienna Convention").

OPINIONS BELOW

The opinion of the Illinois Supreme Court is reported at 739 N.E.2d 423 and is reprinted in the Appendix. (App. 1a-20a)[1] The opinion of the Circuit Court of Cook County is not reported and is reprinted in the Appendix. (App. 21a-47a)

STATEMENT OF JURISDICTION

On August 10, 2000, the Illinois Supreme Court entered its judgment affirming the trial court's denial of the Consul General's and Gregory Madej's petitions for relief. An order denying rehearing was issued on November 27, 2000 and is reprinted in the Appendix. (App. 48a) This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND TREATY INVOLVED

This case involves Article Six of the United States Constitution, as well as the Fourteenth Amendment to the United States Constitution.

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1. References to the Appendix attached hereto appear as (App. __a). References to the common law record appear as (C. __). References to the reports of proceedings appear as (R. __ (Month, Day, Year)). References to the joint brief filed by Petitioners before the Illinois Supreme Court appear as (Joint Brief at __). References to the State of Illinois' brief before that court appear as (State's Brief at __). References to the Petitioners' reply brief before that court appear as (Reply Brief at __).

Article VI to the United States Constitution provides, in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.
>
> The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

Section One of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also involves the Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261. The preamble to the Vienna Convention provides:

The States Parties to the present Convention,

Recalling that consular relations have been established between peoples since ancient times,

Having in mind the Purposes and Principles of the Charter of the United Nations concerning the sovereign equality of States, the maintenance of international peace and security, and the promotion of friendly relations among nations,

Considering that the United Nations Conference on Diplomatic Intercourse and Immunities adopted the Vienna Convention on Diplomatic Relations which was opened for signature on 18 April 1961,

Believing that an international convention on consular relations, privileges and immunities would also contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems,

Realizing that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States,

Affirming that the rules of customary international law continue to govern matters not expressly regulated by the provisions of the present Convention,

Have agreed as follows:

Article 36 of the Vienna Convention provides:

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State

shall have the same freedom with respect to communication with and access to consular officers of the sending State;

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that state is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;

(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.

STATEMENT OF THE CASE

I. BACKGROUND

A. Gregory Madej's Arrest

Gregory Madej is a Polish citizen. (C. 13, 458) He was born on August 25, 1959, in Kielce, Poland. (C. 13, 458) He is fluent in Polish, and has made several trips back to Poland to visit his family. (C. 13-14, 458) As a Polish citizen, he was entitled to the protections of the Vienna Convention. (C. 14-15, 458-59)

Pursuant to Article 36 of the Vienna Convention, the United States (and, pursuant to the Supremacy Clause of the United States Constitution, the State of Illinois) is required to inform a Polish national who has been arrested and detained that he has the right to contact a consular official from his country. (C. 14, 458) Moreover, under the Vienna Convention, the United States is required, upon the detained national's request, to notify the consular post of Poland if a national of Poland is "arrested or committed to prison or to custody pending trial or is detained in any other manner." (C. 14, 458)

Gregory Madej was arrested on August 23, 1981, and was subsequently charged with murder, felony-murder, armed robbery, rape and deviate sexual assault. (C. 14, 458) Immediately after his arrest, the police interrogated him. (C. 14, 458) Even after he indicated that he did not wish to speak to the police, police officers and an Assistant State's Attorney continued to question him. (C. 14, 458) He was denied food, sleep, medical attention, a telephone call, and the right to communicate with an attorney or his family. (C. 14, 458)

The State of Illinois admits that it failed to advise Gregory Madej of his rights under the Vienna Convention. (C. 15, 39, 273, 459, 480) He therefore was unaware that, pursuant to the Vienna Convention, he had the right to consult, and seek the assistance of, the Consulate of the Republic of Poland in Chicago (the "Polish Consulate"). (C. 15, 39, 459, 480)

The Polish Consulate was unaware that Gregory Madej had been arrested and detained in violation of the Vienna Convention pending trial, and therefore was unable to render any timely assistance. (C. 15, 42, 459, 483) As a result, Gregory Madej was forced to rely upon the efforts of his inexperienced trial counsel. As discussed below, the results were disastrous.

B. Gregory Madej's Trial Counsel, With No Prior Experience in Death Penalty Cases, Commits Numerous Errors

In anticipation of trial, an attorney was hired to represent Gregory Madej. (C. 15-16, 460) Unfortunately, his attorney had little if any experience trying criminal cases, and he had no experience whatsoever in a case that involved the death penalty. (C. 16, 460) Defense counsel made a number of critical errors that led to conviction and imposition of the death sentence. Some of the errors are as follows:

(a) Defense counsel failed to conduct pre-trial investigation to defend Gregory Madej suitably at trial. For example, defense counsel failed to develop the theory that a second suspect may have been implicated in the crime, even though there was evidence, including a 911 tape and unidentified latent fingerprints, that strongly suggests another person may have been involved in the murder of the decedent. (C. 16, 460) Development of this theory was also critical for the sentencing phase of the proceedings because it would have pointed to Gregory Madej's limited culpability.

(b) Defense counsel made Gregory Madej testify at trial; as the State admits, defense counsel did not inform him that it was his decision whether or not to testify. (C. 16, 59, 275, 460, 500) The State characterized his testimony as a confession to murder, and the trial court expressly relied upon his testimony in convicting him and, as the State admits, in sentencing him to death. (C. 16, 275, 460)

(c) Defense counsel stipulated to death eligibility (C. 16, 461), even though Gregory Madej has consistently denied committing the underlying felonies that made him death-eligible.

(d) Before the sentencing phase, defense counsel failed to inform Gregory Madej that the jury would have to be unanimous in order to sentence him to death. (C. 17, 59, 63, 461, 500, 504) Accordingly, he opted for bench sentencing.

(e) Defense counsel performed absolutely no mitigation investigation and presented no mitigating evidence on Gregory Madej's behalf during the sentencing proceedings. (C. 17, 59-60, 461, 500-01) Thus, as the Illinois Supreme Court has decided, defense counsel's performance was objectively unreasonable during the sentencing phase. *People v. Madej*, 685 N.E.2d 908, 919 (Ill. 1997) ("counsel's failure in this case to conduct an investigation into potential sources of mitigation fell below the minimum level of competent representation").[2]

However, as noted above, the Polish Consulate was unaware that Gregory Madej had been arrested and detained pending trial, and was unable to render any assistance. Gregory Madej proceeded to trial in August 1982, was convicted, and sentenced to death. (C. 15, 460)

The Illinois Supreme Court affirmed Gregory Madej's convictions and sentence of death on direct appeal. *People v. Madej*, 478 N.E.2d 392 (Ill. 1985). Thereafter, he unsuccessfully sought post-conviction relief. *People v. Madej*, 685 N.E.2d at 932. The Consul General, the diplomatic representative of the

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2. It turns out that inexperience and bad judgment were not the only shortcomings of trial counsel. On December 27, 2000, Gregory Madej filed pleadings with the Circuit Court of Cook County seeking relief from his death sentence on the newly-discovered ground that his trial counsel simultaneously was employed as a full-time prosecutor for the Office of the Secretary of State at the time of his capital murder trial.

Republic of Poland in Chicago, discovered Gregory Madej had been convicted and sentenced to death almost sixteen years after his trial — in May 1998. (C. 18, 42, 463, 483)

II. PROCEEDINGS IN THIS CASE

After the denial of post-conviction relief, Gregory Madej filed two actions in the Circuit Court of Cook County on July 31, 1998, seeking relief from the violations of the Vienna Convention: one based on a Petition for Relief Pursuant to 735 ILCS 5/2-1401, and in the Alternative, Petition for Relief from Void Orders (the "2-1401 Petition"), and the other based on a Petition for Writ of *Mandamus* (the "*Mandamus* Petition").[3]

On December 15, 1998, the Consul General moved to intervene in both actions and filed his own pleadings seeking relief in both cases. (C. 300, 859) The Consul General's motion for intervention was granted by one circuit court judge in the *Mandamus* Proceeding, but denied by another judge in the 2-1401 Proceeding. (R. 4 (Jan. 19, 1999); R. 7 (Feb. 26, 1999)) Both actions were subsequently consolidated before one judge.

A. The Federal Issues Were Raised Below

Each of the issues raised in this petition was raised in the courts below. First, the Petitioners argued in both the Circuit Court and before the Illinois Supreme Court that, because of the violation of the Vienna Convention in this case, the international law of remedies, namely, the remedy of *restitutio in integrum*, rendered Gregory Madej's convictions and death sentence void. The Petitioners also argued that the Supremacy Clause obligated state courts to apply the international law of remedies and *restitutio in integrum*. (C. 22, 27, 29-33; Joint Brief at 2, 14, 20-34) In the alternative and at a minimum, the Consul General requested that the death sentence be set aside and the case remanded for a new hearing on sentencing. (C. 384; Joint Brief at 28-29) This request was based on the heightened procedural guarantees required under international

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3. Two separate petitions were filed in accordance with local rules.

law for imposition of the death penalty, as well as the Republic of Poland's particular concern for "strict compliance" with the Vienna Convention in instances where its nationals might be exposed to a death sentence. (*Id.*)

Second, the Petitioners also argued in the alternative that, should the courts refuse to apply international law, prejudice should be presumed for the reasons stated by this Court in *Strickland v. Washington*, 466 U.S. 668 (1984) and *Arizona v. Fulminante*, 499 U.S. 279 (1991). Moreover, the Petitioners argued that the violation of the Vienna Convention was not harmless beyond a reasonable doubt, and that they satisfied the prejudice standard actually employed by the circuit court through the uncontradicted evidence submitted in support of their petitions for relief. (C. 22-24, 351-55; Joint Brief at 36-50)

Third, the Petitioners also argued that they satisfied various procedural requirements for relief under Illinois law. The Petitioners argued that the 2-1401 Petition and the *Mandamus* Petition were not time-barred because, *inter alia*: (i) Gregory Madej's convictions and death sentence were void under international law, and therefore could be collaterally attacked at any time; (ii) the Consul General only recently discovered the violation of the Vienna Convention, and thus the doctrines of equitable tolling and due process of law rendered his petitions timely; (iii) international law and Article 36(2) of the Vienna Convention did not permit state procedural law to be asserted as a defense to the violation of the Vienna Convention; and (iv) there was no statute of limitations applicable to *mandamus* actions under Illinois law, and they were entitled to issuance of the writ. (C. 22, 27, 465-66, 471, 841; Joint Brief at 22, 60-71)

B. The Illinois Supreme Court's Ruling

On May 3, 1999, the Circuit Court denied the 2-1401 Petition and the *Mandamus* Petition. (App. 47a) Thereafter, Gregory Madej and the Consul General perfected appeals to the Illinois Supreme Court.

On August 10, 2000, the Illinois Supreme Court, by four votes to three, affirmed the Circuit Court's denial of the 2-1401 Petition and the *Mandamus* Petition. As discussed below, the members of the Illinois Supreme Court expressed substantial differences of opinion over the merits of the case.

1. The Ruling Concerning the Appropriate Remedy Under International Law

The majority opinion first addressed the key contention made in the 2-1401 Petition and the *Mandamus* Petition: that under international law, the remedy of *restitutio in integrum* rendered Gregory Madej's convictions and death sentence void. A bare majority of the court concluded that the convictions and death sentence were not void because the orders entered in the case were not void under state decisional law. (App. 7a (citing *R.W. Sawant & Co. v. Allied Programs Corp.*, 489 N.E.2d 1360 (Ill. 1986))) In light of the considerable authority cited by the Petitioners, the majority opinion briefly acknowledged the primacy of the remedy of *restitutio in integrum* under international law. (*Id.*) The majority opinion opted not to apply international law, however; the majority instead suggested that *restitutio in integrum* would require the court to annul something, not render Gregory Madej's convictions and death sentence void. (*Id.*) The majority opinion did not offer any explanation of the difference between the terms "annul" and "void" in international law or any other body of law.

The three dissenters took issue with the majority's analysis. Justice McMorrow, concurring in part and dissenting in part, concluded, *inter alia*, that the violation of the Vienna Convention required a remedy under international law, at least as to Gregory Madej's death sentence. After pointing out that the Supremacy Clause made the Vienna Convention binding upon the States, App. 14a, Justice McMorrow cited the October 1999 advisory opinion of the Inter-American Court of Human Rights, which held that a violation of an international treaty gives rise to "the juridical consequences that a violation of this nature carries, in

other words, those pertaining to *the State's international responsibility and the duty to make reparation*." (App. 15a (citation omitted) (Justice McMorrow's emphasis)).

Justice McMorrow also pointed out that the violation of the Vienna Convention affected the rights not only of Gregory Madej, but of the Republic of Poland, which had a justifiable interest in aiding its national. Moreover, Justice McMorrow pointed out that the Federal Republic of Germany and the United Mexican States, two other signatories to the Vienna Convention, supported the position adopted by the Republic of Poland, and, further, that "El Salvador, Guatemala, the Dominican Republic, Honduras, Paraguay and Costa Rica supported the principle of judicial enforcement of the Vienna Convention in death penalty cases." (App. 16a)

Justice Heiple's dissent, joined by Chief Justice Harrison, expressed similar concerns with the majority's reasoning. Justice Heiple chided the majority for "cavalierly dismiss[ing]" the violation of the Vienna Convention. (App. 20a) Justice Heiple also adhered to the argument raised by the Petitioners: the violation of the Vienna Convention — taken together with the Supremacy Clause — required reversal of the convictions and death sentence. (*Id.*)

2. Rulings on Other Issues

With its decision not to apply *restitutio in integrum*, the majority opinion rejected the claim that the convictions and death sentence were void under international law. Consequently, the majority decided that relief could not be granted to the extent the 2-1401 Petition and the *Mandamus* Petition sought relief from void orders.

Thereafter, the majority considered whether the 2-1401 Petition was otherwise timely filed. The majority ruled that the Consul General's 2-1401 Petition was not timely despite the fact that the Consul General had discovered the violation of the

Vienna Convention only in May 1998. (App. 7a-8a)[4] The majority opinion concluded that the statute of limitations had not been complied with. However, the majority opinion did not address the application of the doctrine of equitable tolling, nor did it address the due process arguments raised with respect to the impropriety of defaulting a sovereign nation that had not received notice of a judgment secured in violation of its treaty rights.[5]

The majority opinion also decided that the Petitioners were not entitled to the relief sought by the *Mandamus* Petition. In this instance, there was *no* statute of limitations problem confronting the *Mandamus* Petition. First, the majority opinion reiterated that the convictions and death sentence were not void. (*Id.* 11a) Thereafter, the majority opinion announced that it would not issue *mandamus* relief because Petitioners had not shown a "clear, affirmative right to relief." (*Id.*) However, the majority opinion did not explain why this standard had not been met.

The dissenters also expressed their doubt over the wisdom of these rulings, particularly the conclusion that the Consul General was time-barred from seeking relief. In the words of Justice McMorrow, "[t]hrough no fault of its own, the Polish government is only now able to assist its citizen in his death penalty defense." (*Id.* 17a) Justice Heiple sounded a similar

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4. The Consul General appealed the denial of his motion for intervention in the proceeding relative to the 2-1401 Petition. The Illinois Supreme Court assumed the Consul General's intervention was permissible for purposes of its opinion. (App. 7a-8a)

5. The majority opinion also rejected the argument that international law and Article 36(2) of the Vienna Convention precluded reliance on a state procedural bar, relying in large measure on this Court's *per curiam* opinion issued with respect to the denial of *certiorari* in *Breard v. Greene*, 523 U.S. 371 (1998).

theme, noting that "[i]n the instant case . . . the Polish Consul General was not even aware of defendant's situation until 1998, some 16 years after his conviction and sentence." (*Id.* 20a)

Thereafter, on November 27, 2000, the Illinois Supreme Court denied a timely-filed petition for rehearing. (*Id.* 48a)

REASONS FOR GRANTING THE WRIT

This petition, filed on behalf of both a sovereign nation and its aggrieved national, presents a critical federal question that deserves this Court's attention — whether or not the state and federal courts may continue to fashion their own remedies for violations of the Vienna Convention, in clear derogation of the text of the treaty and the Supremacy Clause, which collectively require the application of international law to formulate the appropriate remedy for the breach of this treaty.

Unlike previous petitions addressed to this Court by other sovereign nations seeking relief from Vienna Convention violations in death penalty cases — such as in *Breard v. Greene*, 523 U.S. 371 (1998) and *Federal Republic of Germany v. United States*, 526 U.S. 111 (1999) — this case focuses on the application of the international law of remedies. The Republic of Poland, with the support of two other sovereign nations in proceedings before the Illinois Supreme Court and the recent advisory opinion of the Inter-American Court of Human Rights, maintains that the international legal remedy of *restitutio in integrum*, made applicable by the text of the Vienna Convention, requires the annulment of a death sentence entered in violation of the Vienna Convention.

This case also presents an opportunity not afforded the Court in *Breard* and *Federal Republic of Germany*: an opportunity to resolve and fully address the important issue of the appropriate remedy for a violation of the Vienna Convention — without the time pressure of an imminent execution — based on a comprehensive record that has been thoroughly briefed and argued. Indeed, if it is necessary for this Court to consider

the application of domestic law to this case in formulating a remedy, there is ample evidence in the record of the prejudice suffered by Gregory Madej at the hands of defense counsel, whose parade of errors led the Illinois Supreme Court to unanimously conclude that Gregory Madej did not receive the "minimum level of competent representation" during capital sentencing proceedings.

This case is also different from *Breard* and *Federal Republic of Germany* in another important respect. In those cases, this Court took the highly unusual step of issuing *per curiam* opinions explaining the principles that led to the denial of *certiorari*. The procedural issues that prevented the Court from granting *certiorari* in those cases simply are not present here. Accordingly, for these and the other reasons discussed below, the Court should grant this petition.

I. THE WRIT SHOULD BE GRANTED TO DETERMINE WHETHER THE STATE AND FEDERAL COURTS MAY CONTINUE TO FASHION THEIR OWN REMEDIES FOR VIOLATIONS OF THE VIENNA CONVENTION, IN CLEAR DEROGATION OF THE REMEDY MANDATED BY THE TEXT OF THE TREATY, THE INTERNATIONAL LAW OF REMEDIES, AND THE SUPREMACY CLAUSE

This Court's review of the Illinois Supreme Court's decision is warranted because it "decided an important question of federal law that has not been, but should be, settled by this Court," Sup. Ct. R. 10(c), and also "decided an important federal question in a way that conflicts with the relevant decisions of this Court." *Id.*

The Illinois Supreme Court and, for that matter, the federal courts of appeal that have taken up the issue of the appropriate remedy for a violation of the Vienna Convention, have been proceeding "on the erroneous and all-too-common assumption" that the Vienna Convention "means what we think it ought to

mean." *Cf. Apprendi v. New Jersey*, 120 S. Ct. 2348, 2367 (2000) (Scalia, J., concurring). Indeed, "[i]t does not; it means what it says." *Id.*

What this international treaty entered into by over 160 nations, this "Supreme Law of the Land," says, is: "[T]he rules of customary international law continue to govern matters not expressly regulated by the provisions of the present Convention." Vienna Convention, preamble cl. 7. *See also United Nations Conference on Consular Relations: Official Records Volume I: Summary Records of Plenary Meetings and of the Meetings of the First and Second Committees*, at 246 ¶ 7, U.N. Doc. A/CONF.25/16 (1963) [hereinafter "*Official Records I*"] (customary international law governs matters not expressly regulated by provisions of Vienna Convention (Switzerland)). Indeed, even during the debates over Article 36 itself,[6] delegates from several countries pointed out that any issues not expressly addressed in Article 36 would be resolved by reference to customary international law. *Official Records I*, at 43 ¶¶ 55, 2, 5. The Vienna Convention does not expressly provide a remedy for its breach, and therefore reference must be made to international law.

Indeed, the State conceded in its brief before the Illinois Supreme Court that the Vienna Convention itself provides that "the rules of customary international law continue to govern matters not expressly regulated by the provisions of the present Convention." (State's Brief at 46) The State further has "assumed" that "customary international law is incorporated into the U.S. legal system pursuant to the Supremacy Clause." (*Id.*)

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6. *Arizona v. California*, 292 U.S. 341, 359-60 (1934) ("It has often been said that when the meaning of a treaty is not clear, recourse may be had to the negotiations, preparatory works, and diplomatic correspondence of the contracting parties to establish its meaning.") (citations omitted).

One would be hard-pressed to develop a set of circumstances in which the Supremacy Clause would *not* be applicable to the terms of this or any other treaty. Indeed, this Court has instructed that "the courts of justice have no right to annul or disregard any of [a treaty's] provisions, unless they violate the Constitution of the United States." *Doe v. Braden*, 57 U.S. 635, 657 (1854).

Despite the rather clear textual instruction in this treaty and its drafting history requiring reference to the international law of remedies, a bare majority of the Illinois Supreme Court opted to apply its *own* state law to determine the consequences for the violation of the Vienna Convention. (App. 7a)[7] This result, although perhaps permissible under the Articles of Confederation, clearly violates the text of the Vienna Convention, the international law of remedies (as discussed further herein), and the Supremacy Clause. U.S. Const. art. VI, cl. 2. The three dissenters recognized as much: Justice McMorrow emphasized the obligation of the State of Illinois to make reparation for its violation under international law, and Justice Heiple, joined by the Chief Justice, decided that the Supremacy Clause mandated a new trial and sentencing proceeding. (App. 15a, 20a)

Unfortunately, the Illinois Supreme Court's decision is not an anomaly. A number of federal courts of appeals throughout the nation have formulated their own "theories" about the appropriate remedies for violations of the Vienna Convention — *not a single one of them* based on the *text* of the Vienna Convention or the body of law it makes applicable, the

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7. The Illinois Supreme Court also suggested that annulment of an order does not render it void. (App. 7a) Not so. The term "annul" means "to cause to cease to exist: reduce to nothing: blot out: OBLITERATE . . . make inoperative . . . NEUTRALIZE, CANCEL . . . *to make legally void*: declare to be no longer of legal effect." Webster's Third New International Dictionary 88 (1981) (italics added). Indeed, were there any doubt at all left at this point, the term "void" is itself defined as "NULLIFY, ANNUL." *Id.* at 2562.

international law of remedies. Instead, the federal courts of appeals, including the First and Ninth Circuits, have announced that the Vienna Convention is "silent" as to remedies and that, as a matter of policy, an "exclusionary" remedy is typically available only for constitutional or so-called "fundamental" violations. *United States v. Li*, 206 F.3d 56, 61 (1st Cir.) (*en banc*), *cert. denied*, 121 S. Ct. 378 (2000); *United States v. Lombera-Camorlinga*, 206 F.3d 882, 886-87 (9th Cir.) (*en banc*), *cert. denied*, 121 S. Ct. 481 (2000).

Although these opinions often claim that the drafters of the Vienna Convention did not have the exclusion of evidence in mind as a remedy when the Vienna Convention was drafted,[8] apparently these courts also have decided that what the drafters really *did* have in mind was the jurisprudence of the federal courts of the United States of America, along with its (purported) distinctions between violations of certain (undefined) "fundamental" rights and violations of international treaty obligations. Of course, this is not the case. What the drafters of the Vienna Convention had in mind, and what they enshrined in the Vienna Convention, was the primacy of customary international law to resolve issues not "expressly regulated" by the provisions of the treaty. Vienna Convention preamble, cl. 7; *Official Records I*, at 43 ¶¶ 55, 2, 5; 246 ¶ 7.

Looking to international law, it is clear what the appropriate remedy for a violation of the Vienna Convention is: *restitutio in integrum*. The principle of *restitutio in integrum* is well established in international law. The International Court of Justice and other learned commentators have repeatedly recognized that, as the fundamental remedy for a violation of international law, *restitutio in integrum* requires "annulment of the judgment of a national tribunal delivered in contradiction with international law." *Texas Overseas Petroleum Co./*

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8. *See, e.g.*, *Lombera-Camorlinga*, 206 F.3d at 886 ("no reason to think the drafters of the Vienna Convention had these uniquely American rights in mind").

California Asiatic Oil Co. v. Government of the Libyan Arab Republic, (Dupuy, arb., Award of January 19, 1977), *reprinted in* 17 I.L.M. 1, 31-37 (1978) (citations and internal quotation marks omitted).

Even before the establishment of the International Court of Justice, the Permanent Court of International Justice in 1928 recognized that acts in contravention of international law are void. In the celebrated *Chorzów Factory* case, the Permanent Court of International Justice decided that "reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed." *Chorzów Factory (F.R.G. v. Pol.)*, 1928 P.C.I.J. (ser. A) No. 13, at 47 (Sept. 13). The principle of reparation expressed in *Chorzów Factory* was itself premised upon a long series of prior international arbitral decisions. *See* H. Lauterpacht, *The Function of Law in the International Community* 117 (1933).

The considerable legal authority supporting the use of *restitutio in integrum* has culminated with the issuance of an advisory opinion by the Inter-American Court of Human Rights, cited by Justice McMorrow in her opinion.[9] Rejecting the arguments of the United States Department of State that no judicial remedy existed to address a violation of the Vienna Convention, the Inter-American Court of Human Rights held that a violation of the Vienna Convention comes "with the juridical consequences that a violation of this nature carries, in other words, those pertaining to the State's international responsibility and the duty to make

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9. This advisory opinion was not addressed by the First and Ninth Circuits in *Li* and *Lombera-Camorlinga*. Significantly, both decisions failed to address the application of the international law of remedies. These cases are also inapposite here, because in neither case were sovereign nations party to the proceedings (as in *Breard* and *Federal Republic of Germany*), nor did the violations of the Vienna Convention in those cases result in a death sentence — a penalty requiring the strictest observance of procedural safeguards under international law.

reparation." Advisory Opinion OC-16/99, Oct. 1, 1999, *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* ¶¶ 27, 137, 141.7.[10] In the death penalty context, the United States is the *only* party to the Vienna Convention that has taken the position that such violation of the Vienna Convention is not judicially remediable. All other nations that have taken a position disagree.[11]

As the matter currently stands, the decision of the Illinois Supreme Court — and those of several of the federal courts of appeals — conflict with not only the text of the treaty, international law, and the Supremacy Clause, but also with the

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10. Recent and authoritative evidence of the international responsibility of states and the duty to make reparation is found in the Draft Articles of State Responsibility, provisionally adopted by the Drafting Committee of the International Law Commission of the United Nations in 2000, with a view toward codifying pre-existing customary international law. Draft Articles on State Responsibility, article 36, Report of the International Law Commission on the Work of its Fifty-Second Session, UNGAOR Supp. No. 10 at 133, U.N. Doc. A/55/10 (2000). Restitution "is the form of reparation which most closely conforms to the general principle of the law of responsibility according to which the author State is bound to 'wipe out' all the legal and material consequences of its wrongful act . . . ." Report of the International Law Commission on the Work of Its Forty-Fifth Session, [1993] 2 Y.B. Int'l L. Comm'n, pt. 2, at 62, U.N. Doc A/48/10. Under international law the Republic of Poland is therefore entitled to restitution, which in this case requires "juridical restitution," *i.e.*, "rescinding of [a] . . . judicial measure unlawfully adopted in respect of the person . . . of a foreigner . . . ." *Id.* at 64.

11. Indeed, as noted above, the Consul General specifically asked the Illinois Supreme Court to, at a minimum, reverse the death sentence in this case so that he could assist his national during the course of a new sentencing proceeding. This request was based on the greater need for "strict compliance" with the protections of the Vienna Convention in the death penalty context, as well as the Republic of Poland's concern for the imposition of the death penalty on its national. The Consul General is prepared to raise the same arguments in this forum.

decision of the Inter-American Court of Human Rights, which has clearly identified the international law of reparations as the proper source for determining the remedy for violations of the Vienna Convention. In addition, the Illinois Supreme Court and the federal courts of appeal are in conflict with the interpretation of the treaty given by at least nine nations that are party to the Vienna Convention. (App. 16a) Far from lending "harmony" to the interpretation of the treaty as some federal courts of appeals erroneously suggest,[12] these decisions have served to undermine confidence in the United States of America's commitment to abide by its treaty obligations. Because the issues raised in this petition "bear importantly on the conduct of the country's foreign relations and more particularly on the proper role of the Judicial Branch in this sensitive area," *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 407 (1964), this Court should grant the writ.

II. THE WRIT SHOULD BE GRANTED SO THAT THIS COURT CAN ESTABLISH THE STANDARD OF REVIEW FOR VIOLATIONS OF THE VIENNA CONVENTION, IF DOMESTIC LAW IS APPLICABLE

Under the principle of *restitutio in integrum*, a violation of the Vienna Convention requires no showing of prejudice. However, because the issues concerning prejudice have been fully argued and briefed by the parties below, and the record contains ample evidence of prejudice, this case presents an appropriate vehicle to decide the proper standard applicable to violations of the Vienna Convention under domestic law should the Court determine that the international law of remedies is not applicable.

A. Prejudice Should Be Presumed When the Vienna Convention is Violated

Although this Court has suggested that a harmless error standard is appropriate for violations of the Vienna Convention, *Breard*, 523 U.S. at 376, there are compelling reasons to treat

12. *See, e.g., Lombera-Camorlinga*, 206 F.3d at 888.

the violation of the Vienna Convention as structural error. *Arizona v. Fulminante*, 499 U.S. 279, 307-08 (1991). The State's failure to abide by the Vienna Convention amounted to a structural error because the failure to accord Gregory Madej his rights under the Vienna Convention affected the record as a whole. For example, because Gregory Madej was not represented by competent counsel arranged for by the Polish Consulate: (1) he was represented by inexperienced counsel, whose incompetence tainted the entire proceedings; (2) he was not advised of his right to choose whether to testify by defense counsel — an error that resulted in over 30 percent of the trial transcript being comprised of constitutionally infirm testimony; and (3) he unknowingly waived his right to a sentencing jury owing to his attorney's incompetence, and hence, he was sentenced by a different trier of fact altogether.

This Court will also have an opportunity to consider the application of the factors it relied upon in *Strickland v. Washington*, 466 U.S. 668 (1984), to determine whether prejudice should be presumed. This test is satisfied with respect to the denial of consular notification. The failure to accord a defendant his consular rights is "easy to identify": the foreign national was either notified or not. The government is "directly responsible" for failing to give consular notifications. Violations are "easy for the government to prevent": all the government need do is to provide the notice it is legally required to give. Measuring the "precise effects" of the violation may at times be "difficult," and trial courts are able to make "early inquiry" to determine whether a defendant has been duly notified of his consular rights. *Strickland*, 466 U.S. at 692-93.

B. The Violation of the Vienna Convention Was Not Harmless Beyond a Reasonable Doubt

Even if this Court decides that a violation of the Vienna Convention is characterized as an error of the trial type, it did not constitute harmless error in this case. In order for an error to be harmless beyond a reasonable doubt, the verdict rendered

must be "surely unattributable" to the error. *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993). The guilty verdicts and sentences imposed in this case cannot be said to be "surely unattributable" to the failure to abide by the Vienna Convention, because, *inter alia*:

- *There was no mitigation defense at sentencing.* Gregory Madej was sentenced to death after defense counsel conducted no investigation and presented no mitigating evidence at sentencing. *People v. Madej*, 685 N.E.2d at 918 (defense mitigation "tantamount to the presentation of no evidence at all"). With the assistance of the Polish Consulate, Gregory Madej would have enjoyed representation by competent counsel at sentencing who would have investigated and presented evidence relating to Gregory Madej's: (1) character and family background (including his immigrant roots, his brutal beatings as a child, his attempts to defend his mother from physical abuse, the lack of attention he received from his father, his care for his mother after her serious leg injury, and his assistance to recent Polish immigrants) (C. 133-34, 136-38, 574-75, 577-79); (2) educational, military and work history (including his honorable discharge from the United States armed forces) (C. 166, 607); (3) alcohol and drug addiction (including his propensity to lose consciousness after using drugs and alcohol, and the noticeable violent effect drugs and alcohol had on his personality) (C. 177, 180, 618, 621); (4) extreme mental or emotional disturbance at the time of the offense (including expert testimony that his drug abuse resulted in substantially diminished capacity and extreme mental and emotional disturbance) (C. 68-71, 90-91, 509-12, 531-32); (5) relative youth at the time the offense was committed; (6) good behavior during incarceration and excellent rehabilitative potential (C. 141-42, 163, 170-72, 582-83, 604, 611-13); and (7) demonstrated remorse for his conduct. (C. 171, 612) In addition, competent counsel would have presented the testimony of (8) the decedent's

husband, David Doyle, who would have asked the sentencing body to spare Gregory Madej's life (C. 255-56, 695-96); and (9) Father Philipski, who would have testified as to Gregory Madej's good character in prison. (C. 170-72, 611-13)

• *The trial court expressly relied on Gregory Madej's constitutionally infirm testimony in sentencing him to death.* As the State admits (C. 275), Gregory Madej testified at trial without being informed that it was his decision whether he wanted to testify. His damaging testimony (which the State characterizes as a confession to murder) infected the entire proceedings. Had competent counsel been retained with the assistance of the Polish Consulate, this error would not have occurred. Given that the State admits the sentencing court relied on Gregory Madej's testimony (C. 275), it is impossible to say that the death sentence in this case is "surely unattributable" to his testimony.

• *Gregory Madej was unaware a sentencing jury must be unanimous to impose the death penalty.* Had Gregory Madej been informed of the one-juror rule, he would not have waived jury sentencing. (C. 63, 504) Accordingly, there would have been a different sentencer altogether.

Accordingly, this case presents a comprehensive record upon which to determine the appropriate prejudice standard under domestic law and to make a prejudice determination, if necessary.

III. THE WRIT SHOULD BE GRANTED BECAUSE, UNLIKE IN *BREARD* AND *FEDERAL REPUBLIC OF GERMANY*, THERE IS NO BAR TO CONSIDERATION OF THE MERITS

As discussed below, this case presents an opportunity to address the issues presented, free from many of the procedural problems that arose in *Breard* and *Federal Republic of Germany*.

A. The Procedural Issues That Confronted This Court in *Breard* and *Federal Republic of Germany* Are Not Present Here

In light of this Court's stated reasons for denying *certiorari* in *Breard* and *Federal Republic of Germany*, it is important to note what this case is *not* about. First, this Court's jurisdiction over this matter will not be in controversy. This Court has jurisdiction pursuant to 28 U.S.C. § 1257. Accordingly, this Court need not decide whether it may exercise its original jurisdiction. *See, e.g., Federal Republic of Germany*, 526 U.S. at 112 (noting doubt over existence of original jurisdiction).

Second, this is not a "last-minute" request for review prior to a scheduled execution. *Id.* (declining to exercise jurisdiction based in part on "tardiness of the pleas" filed two hours before scheduled execution); *Breard*, 523 U.S. at 372 (denial of *certiorari* issued on evening of scheduled execution). No execution has been scheduled — indeed, the Illinois Supreme Court has issued an order staying its mandate until federal *habeas* proceedings are concluded. (App. 49a) Accordingly, this Court's consideration of this case will not serve to interfere with an imminent execution, as in *Breard* or *Federal Republic of Germany*.[13]

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13. It is also of great significance that the Consul General has sought relief from this Court in an expeditious fashion upon discovering the violation of the Vienna Convention in 1998. Clearly the Consul General has not rested on his rights; on the contrary, the Consul General has been an active participant in these proceedings since the time they were before the Circuit Court of Cook County.

Third, because this matter is on direct review from the Illinois Supreme Court, instead of on *habeas* review, the Antiterrorism and Effective Death Penalty Act of 1996 (the "AEDPA") and the so-called "last-in-time" doctrine, *Whitney v. Robertson*, 124 U.S. 190, 194 (1888), are not applicable to this proceeding. *Cf. Breard*, 523 U.S. at 376 (discussing last-in-time doctrine and AEDPA). Nor is the retroactivity doctrine of *Teague v. Lane*, 489 U.S. 288 (1989), applicable.[14]

Fourth, this case does not implicate Eleventh Amendment principles. The State courts have permitted the Consul General's participation in this case. Indeed, the Circuit Court specifically granted the Consul General's motion to intervene as a party in the proceedings relative to the *Mandamus* Petition, and subsequently, the Circuit Court declined to dismiss the *Mandamus* Petition in part to ensure that the Consul General could participate as a party. (R. 7 (Feb. 26, 1999)) Accordingly, the Eleventh Amendment has no application here. *See McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 30-31 (1990).

Fifth, there is no issue of standing. The Court has properly before it both the sovereign nation that is a party to the Vienna Convention, as well as the individual foreign national who was denied his right to consular notification and assistance under the Vienna Convention. In no real sense can this case turn on the issue of standing, unless the rule is that no one — neither a signatory, nor an aggrieved foreign national — may vindicate their treaty rights in the courts of the United States.

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14. The State did not timely raise a *Teague* defense below. Moreover, *Teague* would not be applicable in any event, because this Court's interpretation of a federal treaty will not announce: (i) a "constitutional" rule; (ii) a rule of "criminal procedure," but instead shall constitute a substantive interpretation of a treaty; and (iii) a "new rule" to the extent it vindicates the authority of federal law over state law pursuant to the Supremacy Clause. *See Teague*, 489 U.S. at 310.

B. There Is No Adequate and Independent State Ground Barring Review

To be sure, although the procedural irregularities that faced this Court in *Breard* and *Federal Republic of Germany* are not present here, the State of Illinois may argue that review is barred by an adequate and independent state ground. Not so. As this Court has explained, in order for a non-federal ground to be sufficient to deny this Court jurisdiction, it must be both adequate and independent. *Michigan v. Long*, 463 U.S. 1032, 1038 (1983). When a state ground of decision is "so interwoven with the [federal ground] as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other," this Court has jurisdiction. *Enterprise Irrigation Dist. v. Farmers Mut. Canal Co.*, 243 U.S. 157, 164 (1917). Such is the case here.

First, as noted above, the Petitioners argued that, under international law, the appropriate remedy for a violation of the Vienna Convention is to void a conviction or death sentence so obtained. In response, the Illinois Supreme Court noted that it appreciated the importance of the remedy of *restitutio in integrum* under international law, but for reasons that were not entirely clear, it did not believe that the remedy rendered the convictions and death sentence void. Thereafter, the majority opinion turned to state law to determine the federal question of whether a violation of international law rendered the orders entered in Gregory Madej's case void — clearly a violation of the Supremacy Clause. Accordingly, there is no independent state ground barring review of Petitioners' claims because the Illinois Supreme Court's decision to deny relief is based upon either: (i) its decision that the international law of remedies does not render the convictions and death sentence void or (ii) its refusal to apply international law in favor of state law. While state law establishes, as a procedural matter, that a void order may be attacked collaterally at any time, it does not, and cannot, establish whether an order is void as a substantive matter pursuant to the international law of remedies. Accordingly, the

Illinois Supreme Court's decision is dependent upon resolution of the federal issues presented. *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985).

Second, the Illinois Supreme Court's decision is not independent because the Illinois Supreme Court denied *mandamus* relief based on the determination that the Petitioners had not "demonstrated . . . a clear, affirmative right to relief." (App. 11a) Accordingly, because this holding rests upon resolution of the federal issues presented herein, this Court may reach the merits. *See Hildwin v. Florida*, 490 U.S. 638, 639 n.* (1989) (*per curiam*) (where state court finds there is "no merit" to petitioner's claim, this Court has jurisdiction).[15]

C. Time-Barring the Petitioners' Claims Violates Due Process and International Law

In its opinion, the four-member majority of the Illinois Supreme Court announced that the Consul General was time-barred from asserting his rights with respect to the 2-1401 Petition, even though the State's failure to comply with the Vienna Convention had the insidious effect of preventing the Consul General from discovering the violation of the treaty until fourteen years after the limitation period passed. The majority did not address the argument that entry of judgment against the Consul General without notice was inconsistent with his due process rights. (Joint Brief at 60-61 (citing *Ligon v. Williams*, 637 N.E.2d 633, 640-41 (Ill. App. Ct. 1994); *Lerner v. Zipperman*, 387 N.E.2d 946, 950 (Ill. App. Ct. 1979))) In rejecting Petitioners' arguments relating to the application of Article 36(2) and international law,[16] the majority opinion

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15. The Petitioners reserve the right to argue, if necessary, that there are compelling reasons that suggest there is no "adequate" state ground barring review either. *Ford v. Georgia*, 498 U.S. 411, 423-24 (1991).

16. Petitioners also argued that reliance on an internal procedural law to evade an international obligation violated international law and

(Cont'd)

relied upon this Court's analysis in *Breard*, which analysis Petitioners believe merits further review.

Accordingly, if necessary for this Court to reach the merits, Petitioners respectfully request that this Court grant the petition to consider whether time-barring the Petitioners under the circumstances of this case is consistent with the protections afforded them under the Due Process Clause, Article 36(2) of the Vienna Convention and international law.

CONCLUSION

For the foregoing reasons, this Court should grant the writ.

(Cont'd)
did not permit "full effect" to be given to the Vienna Convention as required by Article 36(2) thereof. (Joint Brief at 67-69; Reply Brief at 26-27)

WHEREFORE, for the foregoing reasons, Petitioners, the Consul General and Gregory Madej, respectfully ask this Court to grant a writ of certiorari in this cause and vacate the judgment of the Illinois Supreme Court.

Respectfully submitted,

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APPENDIX A — OPINION OF THE SUPREME COURT OF ILLINOIS DATED AND FILED AUGUST 10, 2000

Docket Nos. 87574, 87725, 87726, 87752 cons. — Agenda 8 – May 2000

THE PEOPLE OF THE STATE OF ILLINOIS,

Appellee,

v.

GREGORY MADEJ,

Appellant

(Consul General for the Republic of Poland in Chicago,

Appellant).

JUSTICE RATHJE delivered the opinion of the court:

Defendant, Gregory Madej, appeals from the decision of the circuit court of Cook County denying his petition for relief from judgment (see 735 ILCS 5/2-1401 (West 1998)) and denying his petition for writ of *mandamus* (see 735 ILCS 5/14-101 *et seq.* (West 1998)). Intervenor, Consul General for the Republic of Poland in Chicago, also appeals from the dismissal of the petition for writ of *mandamus*. Moreover, the Consul General appeals the trial court's denial of the Consul General's motion to intervene in the section 2-1401 proceeding.

Appendix A

BACKGROUND
Original Criminal Proceedings

This case began in 1981 when the police arrested defendant after he led them on a car chase through Chicago. When the officers arrested defendant, his hands and head had blood on them, and his shirt, pants, and undershorts were heavily stained with blood. Defendant also had deep scratches on his face and scratches on his chest, arms, and back.

Shortly thereafter, Barbara Doyle, the owner of the car in which defendant fled from the police, was found in an alley on the northwest side of Chicago. Doyle was naked and had died from multiple stab wounds. Her missing clothes were found in the car defendant was driving.

After defendant was arrested, he told the police that a friend named Hojamoto was driving the victim's car. Defendant rode around with Hojamoto, who jumped from the car a block before the police overtook the car. At trial, defendant testified that he was in the car with the victim and twice had consensual sex with her. He explained that the victim pulled a knife during an argument over drugs. They struggled, and the victim began bleeding. He then threw her from the car and left the scene.

Defendant was convicted of murder, armed robbery, rape, and deviate sexual assault and sentenced to death. This court affirmed defendant's conviction and sentence. *People v. Madej*, 106 Ill. 2d 201 (1985). Thereafter, defendant filed a post-conviction petition and amended it in 1993. The trial

court dismissed defendant's petition, and this court affirmed that dismissal. *People v. Madej*, 177 Ill. 2d 116 (1997). Subsequently, defendant sought leave from this court to file a petition for writ of *mandamus*. This court denied that motion.

Current Proceedings

In July 1998, defendant filed the current action. Defendant filed his section 2-1401 petition in the criminal division. Because of local court rules, defendant filed his petition for writ of *mandamus* in the chancery division.

Defendant's section 2-1401 petition alleged that his rights under the Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, and the Consular Convention of 1972 between Poland and the United States,[1] May 31, 1972, 24 U.S.T. 1231, were violated when the police failed to inform defendant that, as a Polish citizen, he had a right to contact a consular official from Poland. Defendant also alleged that, after he was arrested, the United States had a duty to notify the Polish consular that a Polish national had been arrested and detained.[2] Defendant's *mandamus* petition

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1. Unless otherwise noted, we will refer to both treaties singularly as the Vienna Convention.

2. Article 36 of the Vienna Convention provides, in relevant part:

> "(a) consular officers shall be free to communicate with nationals of the sending State and to have access

(Cont'd)

alleged that he was entitled to relief because his conviction and sentence are void under international law.

In December, the Consul General sought leave to intervene in both actions. Judge Albert Green, who was

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(Cont'd)

> to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;
>
> (b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that state is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph." 21 U.S.T. at 101.

The Consular Convention provides, in relevant part:

> "The appropriate authorities of the receiving State shall immediately inform a consular officer of the sending State of the detention or arrest of any national of the sending State who has not been admitted to permanent residence in the receiving State. In the case of the detention or arrest of a national of the sending State who has been admitted to permanent residence in the receiving State, the appropriate authorities of the receiving State, on the request of such national, shall immediately inform a consular officer of the sending State of such detention or arrest." 24 U.S.T. at 1260.

presiding over the *mandamus* proceedings, granted the Consul General's petition. Thereafter, Judge Green transferred the *mandamus* proceedings to Judge Thomas Fitzgerald, who was presiding over the section 2-1401 proceedings. Thereafter Judge Fitzgerald denied the Consul General's motion to intervene in the section 2-1401 proceeding. Subsequently, Judge Fitzgerald denied both petitions. Defendant and the Consul General now appeal.

While this appeal was pending, this court granted leave to the United Mexican States, the Human Rights Committee of the Bar of England and Wales, and the Consulate General of the Federal Republic of Germany in Chicago to file briefs as *amici curiae*.

ANALYSIS

Section 2-1401 Proceeding

Section 2-1401 of the Code of Civil Procedure provides a method for obtaining relief from a judgment after more than 30 days have passed. See 735 ILCS 5/2-1401(a) (West 1998). A section 2-1401 petition must be filed "not later than 2 years after the entry of the order or judgment." 735 ILCS 5/2-1401(c) (West 1998). Relief sought more than two years after the entry of judgment will not be considered absent a showing that the petitioner was under duress, or a legal disability, or that the grounds for relief were fraudulently concealed. *People v. Caballero*, 179 Ill. 2d 205, 211 (1997).

Here, judgment was entered in 1982. Defendant filed his petition in 1998, approximately 14 years after the limitation period expired. Defendant and the Consul General

acknowledge that the petition is untimely, but argue that this court can consider the merits of the petition because (1) under international law defendant's conviction and sentence are void; (2) the Consul General was never told of the treaty violation and thus could not preserve its rights sooner; (3) the State fraudulently concealed from defendant his rights under the Vienna Convention; and (4) the reliance on a state procedural rule to bar an action violates international law.

Voidness

Defendant contends that the principle ***restitutio in integrum***, which is well established in international law, renders his conviction and sentence void. ***Restitutio in integrum*** is defined as:

> "In the civil law, restoration or restitution to the previous condition. This was effected by the prætor[3] on equitable grounds, at the prayer of an injured party, by rescinding or annulling a contract or transaction valid by the strict law, or annulling a change in the legal condition produced by an omission, and restoring the parties to their previous situation or legal relations. The restoration of a cause to its first state, on petition of the party who was cast, in order to have a second hearing." Black's Law Dictionary 1313 (6th ed. 1990).

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3. A Roman municipal officer who possessed "extensive equitable jurisdiction." Black's Law Dictionary 1175 (6th ed. 1990).

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Although we acknowledge the important role that *restitutio in integrum* plays in international law, defendant has not cited any authority to support a conclusion that the principle renders defendant's conviction and death sentence void. Instead, both the quotation from Black's, upon which defendant relies, and the other authorities cited by defendant support the conclusion that *restitutio in integrum* is an equitable remedy for violations of a treaty. To say that the proper remedy for a treaty violation is to annul the act that caused the violation is a far cry from concluding that the remedy means that a court's decision is void.

This court has explained that an order is void if it was entered by a court that lacked jurisdiction of the parties or of the subject matter or that lacked the inherent power to make or enter the particular order involved. *R.W. Sawant & Co. v. Allied Programs Corp.*, 111 Ill. 2d 304, 309 (1986). Here, the trial court clearly had jurisdiction of the parties and of the subject matter and it had the inherent power to make or enter the orders involved. Consequently, we see no basis upon which to conclude that defendant's conviction and sentence are void.

The Consul General's Knowledge

The Consul General argues that the trial court erred in denying its motion to intervene in the section 2-1401 petition. It further argues that the limitation period does not apply to bar its claim because it "only recently became aware that the State of Illinois had tried and sentenced its national to death." If we accept, without deciding, that the Consul General can intervene in the section 2-1401 petition

(a proposition that the State vigorously disputes), we must conclude that the action would be time-barred.

Although a petitioner must demonstrate due diligence to obtain relief pursuant to section 2-1401 (*Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 221 (1986)), a showing of due diligence does not obviate the need to file a section 2-1401 petition within the applicable limitation period. Our case law is clear:

> "[T]he two-year limitation mandated by section 2-1401 and its predecessor, section 72 (Ill. Rev. Stat. 1975, ch. 110, par. 72), must be adhered to in the absence of a clear showing that the person seeking relief is under legal disability or duress or the grounds for relief are fraudulently concealed." *Caballero*, 179 Ill. 2d at 211.

Here, the Consul General does not allege that it was under duress or a legal disability or that the grounds for relief were fraudulently concealed. Consequently, we are unable to conclude that it is entitled to seek relief under section 2-1401 outside the limitation period simply because it did not discover the underlying facts until after the limitation period had expired.

Fraudulent Concealment

Defendant argues that the limitation period was tolled for him because the State fraudulently concealed from him the fact that the Vienna Convention gave him the right to consular assistance. Defendant argues that he has certain rights under the Vienna Convention and that the State had

the duty to inform him of these rights. Defendant concludes that the State's failure to inform him of these rights constitutes fraudulent concealment. We disagree.

To toll the limitation period, the alleged fraud must consist of "affirmative acts or representations designed to prevent discovery of the cause of action or ground for relief." *Crowell v. Bilandic*, 81 Ill. 2d 422, 428 (1980). Here, the fact that defendant was entitled to be informed of his rights under the Vienna Convention is a matter of international law. The rights that defendant asserts the State was obliged to inform him of are rights that are, by defendant's own admission, contained in treaties that are public documents not only in this state, but also in countless countries around the world.

Even if we accept defendant's contention that the State was obligated to inform defendant of these rights, we are unable to conclude that this failure can constitute fraud when the rights are a matter of public record. Consequently, we are unable to conclude that, by failing to inform defendant of his rights, the State fraudulently concealed defendant's grounds for relief.

State Procedural Rule

Defendant also contends that the limitation period must be tolled because a state procedural rule cannot prevent defendant from seeking a remedy for a violation of international law. Defendant acknowledges that the Supreme Court has held that, to determine whether a state's procedural rules govern, a court must look to the treaty's text and

drafting history. See *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 700, 100 L. Ed. 2d 722, 731, 108 S. Ct. 2104, 2108 (1988); see also *Breard v. Greene*, 523 U.S. 371, 375, 140 L. Ed. 2d 529, 537, 118 S. Ct. 1352, 1354 (1998) (holding that, "absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State").

Here, the Vienna Convention provides that the rights expressed in the Convention "shall be exercised in conformity with the laws and regulations of the receiving State subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended." 21 U.S.T. at 101; see also *Breard*, 523 U.S. at 375, 140 L. Ed. 2d at 537, 118 S. Ct. at 1355 (reaching a similar conclusion).

Defendant provides no explanation as to how section 2-1401's limitation period prevents "full effect" from being given to the purposes of the Vienna Convention. Defendant had ample opportunity to raise his claim and have it considered on the merits during his trial, on direct appeal, and during the two years following the entry of judgment. We do not believe that a reasonable limitation period designed to preserve the public's interest in the finality of judgments can be construed as a rule that frustrates the purposes of the Vienna Convention. Because the treaty specifically states that the forum court's rules and regulations will govern, we have no basis to conclude that the reasonable limitation period violates international law.

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Mandamus Proceeding

In the *mandamus* proceeding, defendant and the Consul General argue that *mandamus* relief is appropriate because (1) defendant's conviction and sentence are void; and (2) they raise issues of great public importance and of great importance to the administration of justice.

We have already rejected the argument relating to voidness and need not consider it further.

Mandamus is an extraordinary remedy to compel a public officer to perform a nondiscretionary act. *Lewis E. v. Spagnolo*, 186 Ill. 2d 198, 229 (1999). This court will not issue a writ of mandamus absent a showing of "a clear, affirmative right to relief, a clear duty of the [public officer] to act, and clear authority in the [public officer] to comply with the writ." *Spagnolo*, 186 Ill. 2d at 229.

Although this action may involve issues of "great public importance and of great importance to the administration of justice," that, in and of itself, is not a reason to grant *mandamus* relief. Here, defendant and the Consul General have not demonstrated that they have a clear, affirmative right to relief. Absent such a showing, we will not issue a writ.

CONCLUSION

We affirm the judgment of the circuit court of Cook County. The clerk of this court is directed to enter an order setting Wednesday, November 22, 2000, as the date on which

the sentence of death entered by the circuit court shall be implemented. Defendant shall be executed in the manner provided by law (725 ILCS 5/119-5 (West 1998)). A certified copy of the mandate of this court shall be transmitted by the clerk of this court to the Director of Corrections, to the warden of Tamms Correctional Center, and to the warden of the institution where defendant is confined.

Affirmed.

JUSTICE BILANDIC, specially concurring:

I agree that defendant's claim is procedurally barred and that the judgment of conviction is not void. I therefore join the majority opinion. I write separately, however, to address an issue that was raised during oral argument — the repatriation of defendant to the Republic of Poland.

Defendant was born in Poland. However, as the circuit court observed, defendant has lived in this country for all but the first 18 months of his life. Defendant has attended school here, has earned a living here, and has even served in the United States army. Defendant has committed numerous other crimes for which he was imprisoned in the United States. In short, defendant's life history reflects that he would be a stranger in Poland — without immediate family, friends, and social roots.

A significant interest of the Polish government in this case is to spare defendant from the death penalty. At the time of defendant's arrest in 1981 for the rape and murder of Barbara Doyle, Poland employed the death penalty. Poland

abolished its death penalty, effective January 1, 1998. Amnesty International Report, *The Death Penalty Worldwide: Developments in 1997*, ACT 50/04/98, April 1998, at 5-6.

Defendant has received nearly 20 years of due process from the Illinois courts. We have treated defendant in precisely the same manner as we would treat a United States citizen, and we have given defendant every constitutional right and protection that we would give a United States citizen. Nevertheless, I note that, although such a decision is not within the province of this court, I would favor the repatriation of defendant, a convicted murderer and rapist, to Poland. The Polish government, however, has never requested the return of defendant to Poland. It is up to the Polish government to initiate discussions in this regard with the appropriate authorities of the United States government.

JUSTICE McMORROW, concurring in part and dissenting in part:

Like Justice Heiple, I believe that the State's admitted violation of the Vienna Convention on Consular Relations is a serious matter which requires remedy by this court. However, unlike Justice Heiple, I believe that the remedy in this case should be to vacate defendant's death sentence but not his convictions. I therefore concur in the majority's affirmance of defendant's convictions but dissent from the majority's affirmance of defendant's death sentence.

Article 36(1)(b) of the Vienna Convention on Consular Relations provides that

> "if the accused so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. *The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph.*" (Emphasis added.) Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

The Vienna Convention makes no distinction between resident foreign aliens and recently arrived or visiting foreign nationals. The language of the treaty "is mandatory and unequivocal, evidencing the signatories' recognition of the importance of consular access for persons detained by a foreign government." *Breard v. Pruett*, 134 F.3d 615, 622 (4th Cir. 1998) (Butzner, J., concurring). Further, "[t]he provisions of the Vienna Convention have the dignity of an act of Congress and are binding upon the states. *See Head Money Cases*, 112 U.S. 580, 598-99, 5 S. Ct. 247, 253-54, 28 L. Ed. 798 (1884). The Supremacy Clause mandates that rights conferred by a treaty be honored by the states." *Breard*, 134 F.3d at 622 (Butzner, J., concurring). In the case at bar, there is no question that the State failed to inform defendant, a citizen of Poland, of his right, under article 36(1)(b) of the Vienna Convention, to contact the Polish consulate at the time of his arrest.

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Nor is there any issue that the State's failure to inform defendant of his right to consular notification is a serious violation of international law, particularly since a sentence of death was imposed. The Inter-American Court of Human Rights[4] has recently held that "failure to observe a detained foreign national's right to information, recognized in Article 36(1)(b) of the Vienna Convention on Consular Relations, is prejudicial to the due process of law and, in such circumstances, imposition of the death penalty is a violation of the right not to be deprived of life 'arbitrarily', as stipulated in the relevant provisions of the human rights treaties (*v.g.* American Convention on Human Rights, Article 4; International Covenant on Civil and Political Rights, Article 6), with the juridical consequences that a violation of this nature carries, in other words, those pertaining to *the State's international responsibility and the duty to make reparation.*" (Emphasis added.) *The Right to Information about Consular Assistance Within the Framework of the Guarantees of Due Process of Law*, Advisory Opinion OC-16/99 of the Inter-American Court of Human Rights, par. 141.7, October 1, 1999. This holding mirrors this court's own recognition that death penalty cases require "a high

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4. The Inter-American Court was established under the authority of the American Convention on Human Rights, a treaty which entered into force in 1978. Located in Costa Rica, the Court has seven judges, elected for renewable six-year terms by the 24 states parties to the American Convention. See generally T. Buergenthal, *The Inter-American Court of Human Rights*, 76 Am. J. Int'l L. 231 (1982); T. Buergenthal, *The Advisory Practice of the Inter-American Human Rights Court*, 79 Am. J. Int'l L. 1 (1985). The State Department of the United States actively participated before the Inter-American Court in briefing and oral argument in the proceedings on Advisory Opinion OC-16/99.

standard of procedural accuracy." *People v. Walker*, 91 Ill. 2d 502, 517 (1982).

Further, a violation of the consular notification provisions of the Vienna Convention affects both the rights of the detainee and the interests of the foreign state, in this case, the Republic of Poland. Unquestionably, Poland has a strong state interest in this case. Poland does not have a death penalty. It, therefore, is justifiably interested in aiding and assisting those of its citizens who are subject to the possible imposition of that penalty while abroad. Indeed, as the Consul General for the Republic of Poland in Chicago has frankly acknowledged to this court, it is solely because the Republic of Poland is officially opposed to the death penalty that the Polish government has intervened on behalf of defendant in this case. According to the Consul General, Poland has no intention of adopting a policy of intervention in non-death-penalty cases.

Moreover, Poland is not alone in its concern regarding violations of the right to consular notification in death penalty cases. In the case at bar, *amici* the Federal Republic of Germany and the United Mexican States, both signatories to the Vienna Convention, have taken the position that the violation of the consular notification provisions in the instant case must be remedied because of the severity and finality of the death sentence. Before the Inter-American Court, numerous countries, including Mexico, El Salvador, Guatemala, the Dominican Republic, Honduras, Paraguay and Costa Rica supported the principle of judicial enforcement of the Vienna Convention in death penalty cases. See *The Right to Information about Consular Assistance Within the Framework of the Guarantees of*

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Due Process of Law, Advisory Opinion OC-16/99 of the Inter-American Court of Human Rights, October 1, 1999.

I am fully aware of the procedural obstacles which confront defendant's claim in the case at bar. But this is an extraordinary case. More is at stake here than the rights of a single defendant. "The protections afforded by the Vienna Convention go far beyond [defendant's] case. United States citizens are scattered about the world — as missionaries, Peace Corps volunteers, doctors, teachers and students, as travelers for business and for pleasure. Their freedom and safety are seriously endangered if state officials fail to honor the Vienna Convention and other nations follow their example. Public officials should bear in mind that 'international law is founded upon mutuality and reciprocity. . . .' *Hilton v. Guyot*, 159 U.S. 113, 228, 16 S. Ct. 139, 168, 40 L. Ed. 95 (1895). * * * The importance of the Vienna Convention cannot be overstated. It should be honored by all nations that have signed the treaty and all states of this nation." *Breard*, 134 F.3d at 622 (Butzner, J., concurring). As Justice Heiple correctly observes, we cannot expect that the citizens of this country, while abroad, will be afforded their rights under the Vienna Convention, or indeed, under any treaty, if we do not afford those same international rights to foreign nationals here in the United States. Through no fault of its own, the Polish government is only now able to assist its citizen in his death penalty defense. It is in our own self-interest to uphold the principle of international comity, acknowledge the notification violation that occurred in the case at bar, and provide a remedy.

Accordingly, because defendant's right to consular notification under the Vienna Convention was, in fact,

violated in this case; because that violation is an extremely serious matter under international law; because the sovereign state of Poland has a strong and legitimate interest in aiding and assisting its citizens who are subject to death penalty proceedings; and because it is in the self-interest of the citizens of this state to uphold the rights provided by the Vienna Convention and remedy the error that occurred in this case; I would exercise this court's equitable powers and vacate defendant's death sentence and remand for a new sentencing hearing. I would further hold that, at the remand sentencing hearing, the State may again pursue the death penalty while the Consul General may assist defendant in his defense.

I believe that the unique and compelling circumstances of this case require a remedy for the State's violation of the Vienna Convention. I express no opinion, however, on what effect a violation of the right to consular notification would have outside the context of the death penalty or the facts of this case.

CHIEF JUSTICE HARRISON, dissenting:

I join in Justice Heiple's dissent. I write separately simply to express my view that regardless of the outcome on retrial, defendant cannot be sentenced to death. For the reasons set forth in my partial concurrence and partial dissent in *People v. Bull*, 185 Ill. 2d 179 (1998), the Illinois death penalty law violates the eighth and fourteenth amendments to the United States Constitution (U.S. Const., amends. VIII, XIV) and article I, section 2, of the Illinois Constitution (Ill. Const. 1970, art. I, §2). It is therefore void and unenforceable.

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JUSTICE HEIPLE, also dissenting:

Defendant, a Polish citizen residing in the United States as a permanent resident alien, was, along with other offenses, tried and convicted of murder and sentenced to death. This court affirmed defendant's convictions and sentence on direct appeal. Subsequently, defendant filed a section 2-1401 petition for relief from judgment and a petition for a writ of *mandamus* based upon an alleged violation of his rights under the Vienna Convention on Consular Relations (Vienna Convention). Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

The Vienna Convention is a binding international treaty to which the United States and the Republic of Poland are parties. Article 36 of the Vienna Convention required the State to inform defendant of his right to contact a Polish consular official at the time of his arrest. This was not done. Upon belatedly learning of the defendant's situation, however, the Polish government has now intervened on defendant's behalf.

Although there is no dispute that the State violated the Vienna Convention by failing to provide defendant the required consular notification, the majority declines to provide defendant any relief for this violation. Because this case raises important issues of international relations and the rights of all persons, domestic and foreign, I respectfully dissent.

The State suggests that a letter of apology to the Polish government would rectify this oversight. Whether this

apology would be sent before or after defendant's execution was not specified.

What is cavalierly dismissed here is that the consular notification requirement is meant to ensure that foreign nationals imprisoned abroad have adequate legal representation and that they should be tried in accordance with principles of justice generally recognized in the international community by allowing consular officials to consult with the defendant and with attorneys, court officials and prosecutors. It is important to note that this protection is designed for Americans abroad as well as for foreign nationals in the United States. In the instant case, however, the Polish Consul General was not even aware of defendant's situation until 1998, some 16 years after his conviction and sentence.

The question arises, how can we expect protection under this treaty for American citizens abroad if we do not extend equal protection to foreign nationals residing in the United States? The answer is, we cannot. The decision reached in this case thus has implications reaching far beyond the execution of this defendant.

For the breach of this international convention, defendant's convictions and sentence should be reversed and the cause remanded for a new trial in compliance with the solemn treaty obligations of the United States, which, under our constitution, are the supreme law of the land.

For the reasons given, I respectfully dissent.

CHIEF JUSTICE HARRISON joins in this dissent.

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS, COUNTY DEPARTMENT, CRIMINAL DIVISION DATED AND FILED MAY 3, 1999

IN THE CIRCUIT COURT OF COOK
COUNTY, ILLINOIS
COUNTY DEPARTMENT, CRIMINAL DIVISION

No. 81-C-6407
Hon. Thomas R. Fitzgerald

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Respondent,

vs.

GREGORY MADEJ,

Defendant-Petitioner.

No. 98 CH 10183
Hon. Thomas R. Fitzgerald
(Transferred from Chancery)

GREGORY MADEJ,

Plaintiff, and

RYSZARD SARKOWICZ,

Intervening Plaintiff,

vs.

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JERRY GILMORE, Warden, Pontiac Correctional Center, DONALD P. O'CONNELL, Chief Judge of the Circuit Court of Cook County, and THE CIRCUIT COURT OF COOK COUNTY,

Defendants.

MEMORANDUM OPINION AND ORDER

Petitioner, Gregory Madej, pursuant to the provisions of 735 ILCS 5/2-1401, seeks post-judgment relief from his death sentence and convictions for murder, felony-murder, armed robbery, rape, and deviate sexual assault. In the alternative, Petitioner seeks relief from the aforementioned convictions and sentences, claiming they are void orders entered in violation of international law. As grounds for relief, Petitioner, a Polish national, asserts that his convictions and death sentence were secured in derogation of his rights under the Vienna Convention of 1963 and the Consular Convention of 1972, when police failed to inform petitioner of his right to contact a consular official and failed to notify the Polish Consulate of his arrest and detention.

In addition, Mr. Madej is joined by the Consul General of the Republic of Poland, Mr. Ryszard Sarkowicz, in seeking vacatur of the abovementioned convictions and death sentence, via a writ of mandamus filed in the Chancery Division of the Circuit Court of Cook County, pursuant to 735 ILCS 5/14-101. The Chancery case, which is almost identical to the Criminal case as to cause of action and relief sought, has been transferred to the Criminal Division and will be consolidated in this Court's opinion.

Appendix B

I. BACKGROUND[1]

A. Case Facts and Procedural History

Barbara Doyle's naked body was found in an alley on the north side of Chicago in the early morning hours of August 23, 1981. She had been stabbed and slashed approximately 34 times. Semen was found in her vagina and rectum. Petitioner eventually admitted that he was with Barbara Doyle, and witnesses testified to seeing an intoxicated and "high" Madej in the company of Doyle before her death. Madej admitted that he had consumed at least two cases of beer, drank some whiskey, smoked marijuana, ingested 10 quaaludes, and injected Talwin at that time. At 5:00 a.m. on the day of the murder, police attempted to pull Madej over for driving through a stop sign. Instead of stopping, Madej lead the officers on a high-speed chase. When he was finally apprehended, his hands, head, shirt, pants, and undershorts were covered with blood. The car, which belonged to the victim, was stained with blood. A large knife, as well as the victim's blood-soaked jeans and blouse, were found inside the car. Petitioner claimed that he and the victim had consensual sex, and that he stabbed her in self-defense during a struggle after she tried to steal some drugs from him.

After a bench trial, Petitioner was convicted of the murder, felony murder, rape, deviate sexual assault, and armed robbery of Barbara Doyle. Petitioner was sentenced to death on August 18, 1982. On direct appeal, Petitioner

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1. A more exhaustive review of the facts is contained in *People v. Madej*, 177 Ill. 2d 116 (1997).

alleged *inter alia* that he received ineffective assistance of counsel based on his counsel's failure to present sufficient mitigating evidence at sentencing. The Illinois Supreme Court affirmed Petitioner's convictions and death sentence. *People v. Madej*, 106 Ill. 2d 201 (1985). The United States Supreme Court subsequently denied Mr. Madej's petition for writ of certiorari. *Madej v. Illinois*, 474 U.S. 935 (1985), *reh'g denied*, 474 U.S. 1038 (1985).

In 1986, Petitioner filed a *pro se* petition for relief pursuant to the Post-Conviction Hearing Act. His attorney filed an amended post-conviction petition in 1993. The circuit court dismissed the amended petition without an evidentiary hearing. The Illinois Supreme Court subsequently affirmed the order of the circuit court. *People v. Madej*, 177 Ill. 2d 116 (1997), *reh'g denied*, Sept. 29, 1997. In a comprehensive opinion, the Illinois Supreme Court addressed in detail the following claims made by Petitioner[2]:

- Ineffective assistance of counsel during sentencing for failure to present evidence, failure to inform defendant of the nonunanimity rule, and error in stipulating to death eligibility.

- Ineffective assistance of counsel at trial for failure to advise defendant of right not to

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2. This court takes note of the fact that no Vienna Convention claim is made in the postconviction petition even though one of the attorneys who represented Mr. Madej in that past proceeding, Mr. Amarjeet Bhachu, is one of the attorneys currently representing Mr. Madej in the instant proceeding.

testify, failure to corroborate diminished capacity defense, failure to obtain a timely ruling on motion to suppress, failure to introduce 911 tape recording, and cumulative error.

- Ineffective assistance of counsel on appeal for not arguing the State's failure to preserve exculpatory/mitigating evidence, the trial court's consideration of matters *de hors* the record, a misstatement of the evidence, and errors during sentencing.

The Illinois Supreme Court acknowledged that the failure of Mr. Madej's attorney to conduct an investigation into potential sources of mitigation at sentencing was conduct that fell below the minimum level of competent representation. *See Madej*, 177 Ill. 2d at 136-37. However, the Court determined that although the attorney's performance was deficient in this regard, it was not ineffective assistance since Mr. Madej was not prejudiced as a result of this deficiency. *See id.* After a thorough review, the Court ultimately held that all of Petitioner's claims of ineffective assistance of counsel were without merit.

Subsequently, a petition for writ of certiorari, seeking review of the Illinois Supreme Court's denial of post-conviction relief, was filed and denied by the United States Supreme Court on April 27, 1998. *Madej v. Illinois*, 118 S. Ct. 1565, 1998 U.S. LEXIS 2892 (1998). Petitioner thereafter sought discretionary review of his Vienna Convention and Consular Convention claims by the Illinois

Supreme Court on May 27, 1998, by filing a motion for leave to file a petition for an original writ of mandamus in the Illinois Supreme Court. The Republic of Poland filed a formal diplomatic note with the United States State Department on June 10, 1998, expressing grave concern over the Vienna Convention transgression. The Illinois Supreme Court denied Petitioner's motion for leave to file a petition for an original writ of mandamus on June 17, 1998, under docket number 85534.[3]

Currently pending is Mr. Madej's petition for writ of habeas corpus in the United States District Court for the Northern District of Illinois. Most recently, Mr. Madej's motion for discovery to support his petition for writ of habeas corpus was denied, except for discovery on the 911 tape and on certain tissue and semen samples was granted. *United States ex rel. Gregory Madej v. Gilmore*, 1999 U.S. Dist. LEXIS 4086 (Mar. 23, 1999).

B. The Vienna Convention and Consular Convention

The Vienna Convention on Consular Relations is a multinational treaty which was adopted by the United Nations in 1963 and ratified by the United States in 1969. Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T 77 [hereinafter Vienna Convention]. The Vienna Convention guarantees consular officials of each nation that has adopted it access to their nationals who may need assistance when traveling, working, or living abroad. In particular, the arresting government is required to notify a foreign national

3. The denial of the motion will have no bearing on this case.

who has been arrested or detained of his right to contact his/her consul so that the foreign national may communicate with, and be visited by, consular officials. At minimum, it provides a cultural bridge for detained nationals who must otherwise navigate through an unfamiliar and often hostile legal system. William J. Aceves, *Murphy v. Netherland*, 92 A.J.I.L. 87, 89 (January 1998). It also enables governments to monitor the safety and fair treatment of their nationals abroad, to reassure relatives and friends at home, to promote respect for human rights, and to avoid disruptions in foreign relations that could result from the mistreatment of detained persons. *Id.*

Today well over 100 nations have accepted the Vienna Convention, which depends for its effectiveness on the reciprocal obligations it imposes on all signatories, without regard to their political systems or legal processes. By express command of the United States Constitution, it is the duty of the judges of every state to uphold and enforce treaties entered into by the United States. *Dominguez v. State*, 90 Tex Crim 92 (1921). *See also United States v. Minnesota*, 270 U.S. 181 (1926). Therefore all courts, state and national, must take judicial notice of and be governed by a treaty of the United States. *United States v. Rauscher*, 119 U.S. 407, 418 (1886). However, the use of a State's violation of the Vienna Convention as a cause of action or a defense in federal habeas proceedings is relatively new and first gained national and international attention when the State of Virginia prepared to execute Angel Breard, a Paraguayan national, who filed a federal habeas corpus petition claiming his conviction and sentence should be overturned because of a Vienna Convention violation. *See Breard v. Greene*, 523 U.S.

371, 1998 U.S. LEXIS 2465 (1998) (per curiam). *See also Breard v. Pruett*, 134 F.3d 615 (4th Cir. 1998); *Republic of Paraguay v. Allen*, 134 F.3d 622 (4th Cir. 1998). The use of state proceedings for Vienna Convention violations is even more recent than the use of federal habeas proceedings since, until recently, the treaty violations were not discovered until the cases had progressed into federal court. To date, the United States Supreme Court has denied certiorari to both death penalty cases in which a foreign national defendant claimed a violation of his Vienna Convention rights. *See Faulder v. Texas*, 119 S. Ct. 909 (1999) (Joseph Stanley Faulder is a Canadian national on death row in Texas.) and *Breard v. Greene*, 523 U.S. 371, 1998 U.S. LEXIS 2465 (1998).

The Consular Convention of 1972 between Poland and the United States is a more specific agreement which supplements the Vienna Convention and covers matters, such as particular privileges and immunities, which may not have been outlined in the Vienna Convention, and/or which may be unique to the United States's diplomatic relationship with Poland. Consular Convention, May 31, 1972, U.S.-Pol., 24 U.S.T. 1231.

C. Consolidation of Criminal and Civil Proceedings

In order to ensure exhaustion of state remedies, Petitioner concurrently filed 1) a petition for post-judgment relief pursuant to 735 ILCS 5/2-1401 in the Criminal Division of the Circuit Court of Cook County, and 2) a petition for a writ of mandamus pursuant to 735 ILCS 5/14-101 in the Chancery Division of the Circuit Court of Cook County. The

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Chancery case has been transferred to this court for consolidation since Mr. Madej raises the same issues and seeks the same relief in both petitions. This court has consolidated the two cases in the interests of judicial economy and the efficient disposition of this litigation. *See infra* Part II.B.

II. ANALYSIS

As discussed below, Petitioner is barred from raising his Vienna Convention and Consular Convention claims because his petition is late. Even if his petition was timely, his claims would not succeed because he has failed to show that the denial of consular notification prejudiced the outcome of his trial.

A. Statute of Limitations

Pursuant to 735 ILCS 5/2-1401, a petition for post-judgment relief must be filed no later than two (2) years after the entry of the order or judgment unless the person seeking relief was under legal disability or duress or the ground for relief was fraudulently concealed. 735 ILCS 5/2-1401 © (West 1998). Courts have strictly construed this provision of the statute in furtherance of the policy favoring finality of judgments. *Bank of Ravenswood v. Dominos*, 269 Ill. App. 3d 714, 724 (1st Dist. 1995). Even for violations of international treaties, the procedural rules of the forum State govern the implementation of the treaty in that State. *See Sun Oil Co. v. Wortman*, 486 U.S. 717, 723 (1998); *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 700 (1988). Petitioner has filed his § 2-1401 petition on or

about July 31, 1998, 16 years after a judgment was entered against him in 1982. By not asserting his Vienna Convention and Consular Convention claims in a timely manner, Mr. Madej has failed to exercise his rights under both treaties in conformity with the laws of the United States and the State of Illinois. He is therefore barred from raising his Vienna Convention and Consular Convention claims because his petition is late.

Petitioner, who is a Polish national, argues that his late filing should be excused because the State "fraudulently concealed" his rights to assistance from the Polish Consulate under both Conventions. In order to overcome the limitations period by showing fraudulent concealment, the petitioner must demonstrate "affirmative acts designed to prevent discovery of a cause of action or ground of relief." *Bank of Ravenswood*, 269 Ill. App. 3d at 724. *See also Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 226-28 (1986). Silence alone does not constitute fraudulent concealment. *Id.* In this case, Petitioner has not stated or shown how the police or the State took affirmative action to prevent Petitioner from learning about and exercising his rights under the Vienna Convention and Consular Convention. Instead, Petitioner's claim focuses on the State's silence or failure to advise Petitioner, which does not amount to fraudulent concealment under the law. Furthermore, there was nothing preventing Petitioner, or any of the attorneys who have represented him since 1982, from learning of the provisions of both Conventions and raising such a claim in a timely manner.

Petitioner has also argued in the alternative that because his convictions and death sentence were obtained in

contravention of international law, they are void. As a result, Petitioner claims the two-year time limitation of § 2-1401 does not apply to his claims. However, the State is correct in pointing out that Petitioner has failed to cite one case supporting the proposition that a defendant's conviction or sentence is void if the Vienna Convention was not followed in his or her case. On the contrary, the country's highest court, in addressing a procedurally defaulted claim of a Vienna Convention violation in *Breard v. Greene*, stated that even if the claim had been properly raised and proven, "it is extremely doubtful that the violation should overturn a final judgment of conviction without some showing that the violation had an effect on the trial." 523 U.S. at __, 1998 U.S. LEXIS 2465, at *9[4]. The High Court's statement about

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4. Mr. Madej has argued that because the United States Supreme Court's per curiam decision in *Breard* accompanies a denial of certiorari, it has no precedential value. (Report of Proceedings of November 9, 1998 hearing at 20). Although the High Court has noted that "opinions accompanying the denial of certiorari cannot have the same effect as decisions on the merits," (*Teague v. Lane*, 489 U.S. 288, 296 (1989)), the *Breard* Court did not merely deny certiorari. It is common for per curiam rulings to be used for orders in original jurisdiction cases. *See* Steven C. Sparling, Note, *Cutting the Gordian Knot: Resolution of the Sentencing Dispute Over Dismissed Charges After United States v. Watts*, 6 Geo. Mason Law Rev. 1073, 1092 n. 177 (1998). Moreover, as a basic tool of Supreme Court jurisprudence, per curiam opinions are not intended to be ignored or relegated to insignificance. *Id.* at 1093. Furthermore, many cases, both in federal and state court, have relied on *Breard* in their opinions. *See, e.g., United States v. Oropeza-Flores*, 1999 U.S. App. LEXIS 5991, No. 98-50305 (9th Cir. 1999); *United States v. Lombera-Camorlinga*, 1999 U.S. App. LEXIS 5053,

(Cont'd)

showing an "effect on the trial" is consistent with the decisions of a number of federal circuits, which have required the defendant to establish prejudice from an alleged Vienna Convention violation. *See United States v. Oropeza-Flores*, 1999 U.S. App. LEXIS 5991, No. 98-50305 (9th Cir. 1999); *United States v. Lombera-Camorlinga*, 1999 U.S. App. LEXIS 5053, No. 98-50347 (9th Cir. 1999); *United States v. Fredi Ademaj*, 170 F.3d 58 (1st Cir. 1999); *United States v. Salas*, 1998 U.S. App. LEXIS 32633, No. 98-4374 (4th Cir. 1998); *Murphy v. Netherland*, 116 F.3d 97 (4th Cir. 1997); *Faulder v. Johnson*, 81 F.3d 515 (5th Cir. 1996). *See also United States v. Rangel-Gonzales*, 617 F.2d 529 (9th Cir. 1980); *United States v. Calderon-Medina*, 591 F.2d 529 (9th Cir. 1979) (Prejudice analysis employed in both cases when I.N.S. failed to advise defendants of their right to contact their consulates as required by I.N.S. regulations.) Accordingly, this court does not consider Petitioner's convictions and sentence to be automatically void as a result of a Vienna Convention violation. Thus, the two-year statute of limitations applies to bar the instant proceeding.

B. Petition for Writ of Mandamus

Madej's challenge to his criminal convictions and sentence were properly made in this forum via a § 2-1401 petition. A mandamus action, such as the Petitioner filed concurrently in Chancery, may not be used as a substitute

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(Cont'd)
No. 98-50347 (9th Cir. 1999); *United States v. Fredi Ademaj*, 170 F.3d 58 (1st Cir. 1999); *Villafuerte v. Stewart*, 142 F. 3d 1124, 1125 (9th Cir. 1998); *Consulate General of Mexico v. Phillips*, 17 F. Supp. 2d 1318 (So. Dist. Fla. 1998); *Kasi v. Virginia*, 256 Va. 407 (1998).

for seeking traditional post-judgment relief in a criminal case when the issues and relief sought are precisely the same. Therefore, the mandamus action must fail on procedural grounds. Even if the mandamus action were to survive procedural attack, it would not succeed for the reasons discussed *infra* in Part II. D.

C. Intervening Petitioner

After Mr. Madej filed his petitions in the Criminal Division and Chancery Division, the Consul General of the Republic of Poland (Consul General) requested leave to intervene as a party in both matters. Decisions from several federal circuits appear to stand for the proposition that a foreign national's country has standing to seek redress for the violation of a treaty because treaties are designed to protect the sovereign interests of nations. *See Paraguay v. Allen*, 134 F.3d 622, 626 (4th Cir. 1997); *Matta-Ballesteros v. Henman*, 896 F.2d 255, 259 (7th Cir. 1990); *United States v. Rosenthal*, 793 F.2d 1214, 1232 (11th Cir. 1986). However, the State countered that the Consul General should not be allowed to intervene as a party because there is no specific judicial remedy available to a foreign sovereign who seeks vacatur of a criminal conviction and death sentence for a Vienna Convention violation. This court agrees with the State and is persuaded by the United States Supreme Court's comment on Paraguay's standing in *Breard*. Specifically, the *Breard* Court stated that neither the text nor the history of the Vienna Convention clearly provides a foreign nation a private right of action in United States' courts to set aside a criminal conviction and sentence for a violation of consular notification provisions. *Breard*, 523 U.S. at __, 1998 U.S.

LEXIS 2465, at *10. Consequently, this court holds that the Consul General does not have standing to set aside Mr. Madej's convictions and sentence. However, inasmuch as the Chancery Division allowed the Consul General to intervene, his petition will be taken into consideration in the context of this opinion.

D. Petitioner's Claims of Vienna Convention and Consular Convention Violations

Petitioner argues that his rights to a fair trial were violated because the police never told him he could contact the Polish Consulate, nor did police inform the Polish Consulate of his arrest and detention. Petitioner contends the State had an affirmative duty to inform him of his rights to consular assistance and to notify the Polish Consulate under Article 36 of the Vienna Convention. 21 U.S.T. 77. Petitioner also claims the State had a duty to notify the Polish Consulate under Article 29 of the Consular Convention. 24 U.S.T. 1231. Because this court deems the Petitioner was not entitled to automatic notification of his consulate pursuant to the Consular Convention, that issue will be addressed first.

Article 29(2) of the Consular Convention states, in pertinent part:

> The appropriate authorities of the receiving State shall immediately inform a consular official of the sending State of the detention or arrest of any national of the sending State who has not been admitted to permanent residence in the receiving

> State. In the case of the detention or arrest of a national . . . *who has been admitted to permanent residence* in the receiving State, the appropriate authorities of the receiving State, *on the request of such national*, shall immediately inform a consular officer of the sending State of such detention or arrest. (emphasis added)

24 U.S.T. 1231.

Automatic notification of a foreign national's consulate under Article 29 depends on the visa/residency status of the foreign national. If the foreign national is a permanent resident, consul notification is *not* automatic, but is triggered by the foreign national's request. In the instant case, Petitioner is a *permanent resident* Polish national who immigrated to the United States with his mother in 1961 when he was 1-½ years old. *See* Report to the Court by Jill Miller, M.S.S.W., June 7, 1991 (Pet.'s Ex. 6). There is no indication from the petition and attached affidavits that he ever requested the Polish Consulate be notified of his arrest and detention. Therefore, there was no violation of Article 29 of the Consular Convention.

However, as to the Vienna Convention, the Court finds that the State did violate Article 36 by failing to advise Petitioner of his right to speak to the Polish Consulate.

Article 36 of the Vienna Convention states in pertinent part:

> (a) Consular officers shall be free to communicate with nationals of the sending State and to have

> access to them. Nationals of the Sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;
>
> (b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that state is arrested . . . or is detained in any other manner . . . *The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph.* (emphasis added)

21 U.S.T. 77.

In this regard, the State's violation resulted from the failure to inform Mr. Madej of his rights under the Vienna Convention.[5]

Whether a State's Vienna Convention violation can overturn a defendant's conviction and sentence in a state proceeding is a matter of first impression in this court. Since the use of a Vienna Convention violation as a cause of action has been analyzed in various types of federal proceedings, this court looks to the federal courts for guidance and is persuaded by the sound, three-step analysis used in *United*

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5. This court takes note of the fact that had Mr. Madej been informed of his rights, it is nevertheless speculative that he would have requested his consulate to be notified of his detention, as discussed in Part II.D.3.

Appendix B

States of America v. Esparza-Ponce, 7 F. Supp. 2d 1084 (S.D. Cal. 1998), specifically to determine whether a Vienna Convention violation is analogous to a Miranda violation. First, the court must determine whether the defendant has standing to challenge a violation of the Convention. Id. at 1095. Second, assuming the court answers that question in the affirmative, the court must decide whether defendant must show prejudice. *Id.* at 1096. Third, if he must show prejudice, the court must decide whether he has done so. *Id.* at 1097. The *Esparza-Ponce* court's requirement of a showing of prejudice is consistent with the decisions of other federal circuits, as well as the United States Supreme Court's *Breard* opinion.

Petitioner has given various reasons why this court should deviate from the prejudice analysis established by federal courts and should instead *presume* prejudice from a denial of consular notification by analogy to cases where states deny or interfere with counsel and by analogy to cases where conflicts affect attorney performance. However, there is no legal precedent for what Petitioner wants. To the contrary, the United States Supreme Court recently denied certiorari in *Faulder v. Texas*, 119 S. Ct. 909 (1999), in which a Canadian national filed a habeas petition, asserting a Vienna Convention violation. The Fifth Circuit originally denied habeas relief to Joseph Stanley Faulder because the evidence that would have been obtained by the Canadian government is the same as or cumulative of evidence defense counsel had or could have obtained. *See Faulder v. Johnson*, 81 F. 3d 515, 520 (5th Cir. 1996). The United States Supreme Court had the opportunity to review the *Faulder* case and use it to alter, revise, or clarify its decision in *Breard*. Instead,

the High Court denied certiorari. Furthermore, as recently as last month, the Court of Appeals for the Ninth Circuit rejected the argument that prejudice should be presumed when a foreign national's Vienna Convention rights have been violated. *See United States v. Lombera-Camorlinga*, 1999 U.S. App. LEXIS 5053, at *9-10, No. 98-50347 (9th Cir. Mar. 25, 1999).

Petitioner has also proposed that the court should apply international law to void Petitioner's convictions and sentence. However, the fact remains that no other case in the United States dealing with a Vienna Convention Article 36 violation has used international law in its analysis.

For these reasons, this court will proceed within the framework established by the federal circuits in dealing with Vienna Convention violations and require Petitioner to make a showing of prejudice before he can secure a remedy.

1. *Petitioner has arguably established standing to challenge a violation of the Vienna Convention, but this court holds that a violation of Petitioner's Vienna Convention rights will not be treated the same as a violation of Fifth and Sixth Amendment rights.*

A threshold question in assessing claims of an alleged violation of treaty rights under the Vienna Convention is whether the individual seeking redress has standing to assert the alleged violation. Treaties are contracts between sovereigns. *Tabion v. Mufti*, 73 F.3d 535, 537 (4th Cir. 1996). Thus, only the signatory nations generally have standing to enforce a treaty. *See United States v. Rosenthal*, 793 F.3d 1214, 1232 (11th Cir. 1986). An exception exists, however,

if a treaty confers rights on individuals. *See Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 442 (1989). The question thus becomes whether the Convention confers individual rights.

The *Breard* Court opted not to discuss Angel Breard's standing, holding instead that Breard had procedurally defaulted his claim by not raising the issue in state court. *Breard*, 523 U.S. at __, 1998 U.S. LEXIS 2465, at *6-7. But in dictum, the *Breard* Court stated that the Convention arguably confers on an individual the right to consular assistance following arrest. *Id.* at *7. To date, at least one federal court has held that the Vienna Convention does not create constitutional rights. *See Murphy v. Netherland*, 116 F.3d 97, 99-100 (4th Cir. 1997). According to the *Murphy* court, although states may have an obligation under the Supremacy Clause to comply with the provisions of the Vienna Convention, the Supremacy Clause does not convert violations of treaty provisions (regardless of whether those provisions can be said to create individual rights) into violations of constitutional rights. *Id.* Despite the uncertainty in this area, a number of courts have allowed individual claims of Vienna Convention violations to proceed in various contexts from habeas proceedings to motions to suppress. *See, e.g., Breard v. Greene*, 523 U.S. 371 (1998) (per curiam); *United States v. Lombera-Camorlinga*, 1999 U.S. App. LEXIS 5053, No. 98-50347 (9th Cir. Mar. 25, 1999); *United States v. Salas*, 1998 U.S. App. LEXIS 32633, No. 98-4374, (4th Cir. Dec. 31, 1998); *Villafuerte v. Stewart*, 142 F.3d 1124 (9th Cir. 1998); *Faulder v. Johnson*, 81 F.3d. 515, 520 (5th Cir. 1996); *United States v. Chaparro-Alcantara*, 1999 U.S. Dist. LEXIS 2640, No. 98-30070

(C.D. Ill. Mar. 4, 1999); *Mami v. Van Zandt*, 1989 U.S. Dist. LEXIS 5002, No. 89-Civ-0554 (TPG) (S.D.N.Y. May 9, 1989).

In this case, the treaty language states that the rights enumerated in Article 36 belong to the foreign national: "The said authorities shall inform the person concerned without delay of *his rights* under this subparagraph." Vienna Convention, art. 36(1)(b), 21 U.S.T. 77. Based on this and in keeping with the trend in federal courts, this court feels that Petitioner arguably has standing to challenge a Convention violation because he has demonstrated the State violated his rights. However, while this court recognizes that compliance with treaty obligations is clearly required by the Constitution, this court declines to equate rights under Article 36 of the Vienna Convention with fundamental rights such as the Fifth Amendment right against self-incrimination or the Sixth Amendment right to counsel, which originates from concepts of due process as directly guaranteed by the Constitution. *See Waldron v. I.N.S.*, 17 F.3d 511, 518 (2d Cir. 1993) ("Although compliance with our treaty obligations clearly is required, we decline to equate such a provision with fundamental rights . . .").

2. *Petitioner must show how the Vienna Convention violation has prejudiced his case.*

In *Breard*, the United States Supreme Court stated that even if Breard's claim had been properly raised and proven, "it is extremely doubtful that the violation should overturn a final judgment of conviction without some showing that the violation had an effect on the trial." 523 U.S. at __, 1998

U.S. LEXIS 2465, at *9. The idea that a person who alleges a Vienna Convention violation has the burden of establishing prejudice from the alleged violation has been established repeatedly by the Ninth Circuit as well as other federal courts, including Illinois' Central District in *United States v. Chaparro-Alcantara*, 1999 U.S. Dist. LEXIS 2640, No. 98-30070 (C.D. Ill. Mar. 4, 1999). *See, e.g., United States v. Oropeza-Flores*, 1999 U.S. App. LEXIS 5991, No. 98-50305 (9th Cir. Mar. 31, 1999); *United States v. Lombera-Camorlinga*, 1999 U.S. App. LEXIS 5053, No. 98-50347 (9th Cir. Mar. 25, 1999); *United States v. Salas*, 1998 U.S. App. LEXIS 32633, No. 98-4374 (4th Cir. 1998); *Murphy v. Netherland*, 116 F.3d 97 (4th Cir. 1997); *Faulder v. Johnson*, 81 F.3d 515 (5th Cir. 1996); *Waldron v. INS*, 17 F.3d 511, 518 (2d Cir. 1993); *United States of America v. Esparza-Ponce*, 7 F. Supp. 2d 1084 (S.D. Cal. 1998). Without a doubt Mr. Madej must demonstrate how the violation has prejudiced his case.

3. *Petitioner has failed to demonstrate prejudice because he has not proved ineffective assistance of counsel, and his claims that consular notification would have ensured him a better attorney and aggressive consular assistance are merely speculative.*

To establish prejudice, Petitioner must produce evidence that: 1) he did not know his right; 2) he would have availed himself of the right had he known of it; and 3) there was a likelihood that the contact [with the consul] would have resulted in assistance to him. *United States v. Proa-Tovar*, 975 F.2d 592, 594-95 (9th Cir. 1992).

Appendix B

Petitioner has stated by affidavit that he did not know of his Vienna Convention rights and would have contacted the Polish Consulate had he known to do so. Pet.'s Ex. A. He further asserts that the outcome of his trial would have been different had he been able to avail himself of consular assistance. Specifically, Petitioner alleges that his attorney was incompetent and made numerous mistakes during the trial and sentencing, which would not have occurred had the Petitioner been able to contact the Polish Consulate for guidance and obtained their recommendation of a presumptively competent defense attorney. Petitioner has given Paraguay and Mexico as examples of governments which secured "first class legal representation for their nationals facing capital charges." Based on this, Petitioner claims that the State's noncompliance with the Convention was not harmless error, prejudiced his case, and necessitates the automatic reversal of those same convictions and death sentence. However, Petitioner's argument must fail because, as previously discussed in Part I.A., the Illinois Supreme Court already ruled that Petitioner failed to establish ineffective assistance of counsel in his post-conviction petition. *See Madej*, 177 Ill. 2d at 116. Therefore, this court finds that Petitioner's claim of prejudice from a Vienna Convention violation is speculative at best and evidently an attempt to revisit an issue which has already been clearly resolved by the Illinois Supreme Court.

Furthermore, Mr. Madej's claims are also speculative in the sense that even if he had been told of his Vienna Convention rights, notification of the Polish consulate would not have been automatic, but would have taken place only at his request. To this effect, he has made no showing that would indicate with certainty that he would have requested the

Polish consulate to be contacted.[6] Mr. Madej came to the United States at the age of 1-½ and is a legal permanent resident. He completed first grade through eleventh grade and had a paper route in the United States. He worked at an herb store, gas station, printing press, Jewel Food Store, electronics plant, can company, and packaging company in the United States. He served in the Army in the United States. He committed several, smaller crimes, for which he was arrested and imprisoned, in the United States. And at the time of his arrest for the murder of Barbara Doyle, he had been living in this country for 20 years. Based on this, the court finds that Mr. Madej's situation was significantly different from that of other foreign nationals (e.g. tourists) who may not even speak English and would naturally avail themselves of and rely upon their consulate to help them navigate through an unfamiliar legal system.

Moreover, at the time of Petitioner's arrest and detention, Poland was under communist regime and had the death penalty.[7] Also, Mr. Madej reportedly holds strong anti-communist views, which a psychologist attributed to Mr. Madej's exposure to Poland's history and his upbringing in a family which immigrated to the United States during the

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6. The court has considered Mr. Madej's affidavit in which he states that he would have contacted the Polish Consulate had he been informed of his right to do so. (Pet.'s Exhibit A) The affidavit, standing alone, does not persuade the court that Mr. Madej would have acted in such a way in 1981.

7. Only in 1997 was the death penalty abolished in Poland. Amnesty International Report, *The Death Penalty Worldwide: Developments in 1997*. ACT 50/04/98, April 1998, at 4, <http://www.amnesty.org/ailib/1988/A5000498.htm>.

Stalin era. *See* Report to the Court by Jill Miller, M.S.S.W., June 7, 1991. (Pet.'s Ex. 6) Under the circumstances, Mr. Madej may very well *not* have sought help from the Polish government. Likewise, the communist, Polish government which had the death penalty at that time may not have been willing or capable of securing the first class legal representation for their nationals facing capital charges. Therefore, it is conjecture to claim that Petitioner would have surely contacted his consulate had he been advised of his Vienna Convention rights. For the same reasons, it is also mere speculation to say in hindsight that the Polish government at that time would have aggressively assisted in Petitioner's defense.

In addition, this court is not persuaded by the recent Minnesota case, *Ademodi v. Minnesota*, Court File No. 90063152 (Minn. Dist. Ct. Dec. 21, 1998). In *Ademodi*, a Nigerian national was arrested for his alleged involvement in a drug transaction and was not notified of his Vienna Convention rights. He was later found guilty of a controlled substance crime, but he was eventually convicted of a misdemeanor and sentenced to only one year of probation, which he successfully completed. Ademodi then sought to vacate and expunge his prior conviction because he was denied consular notification. The District Court of Hennepin County granted the motion.

Ademodi is distinguishable from the instant case for several reasons. First of all, the crimes for which Mr. Ademodi and Mr. Madej were convicted could not be more different. Ademodi was convicted of a misdemeanor, whereas Madej was convicted of murder, felony murder, armed robbery, rape, and deviate sexual assault and seeks vacatur

of these convictions. Secondly, the record in *Ademodi* revealed that he would have contacted the Nigerian consul had he been informed of his right to do so in order to protect his citizenship and residency status. *Ademodi* at p. 5. Ultimately, the *Ademodi* court was persuaded by the fact that it was "very likely that the Nigerian Embassy would have responded in a helpful manner when one of its nationals, clear of record or offense, has called upon it for direction and expertise regarding the impact of U.S. immigration laws on its citizens." *Id.* By contrast, as previously discussed, the court is not persuaded that Mr. Madej would have requested the help of the Polish Consulate, or that the Polish government would have responded in a helpful manner.

Since this court has found no prejudice resulting from the alleged violation of the Vienna Convention, this court likewise holds that Mr. Madej's convictions and death sentence are valid. Although this court can envision a situation where a Vienna Convention violation can require reversal of a conviction and sentence, the fact that Petitioner was not prejudiced by the violation is crucial to this court's decision to deny his petition.

III. CONCLUSION

Based on the foregoing discussion, this court finds that Petitioner is barred by the statute of limitations from raising his Vienna Convention and Consular Convention claims. Moreover, even if Mr. Madej's § 2-1401 petition was timely filed, his Consular Convention claim must fail because there was no violation. The Vienna Convention claim would not succeed because Petitioner has not conclusively shown that the denial of consular notification prejudiced or otherwise

changed the outcome of his trial. Similarly, assuming that Petitioner's mandamus action would survive all other procedural attacks, it would fail for the same reason.

Mr. Madej's Vienna Convention claim is premised on the assertion that his attorney's performance was deficient and prejudicial, and the chance to contact the Polish Consulate would have led to the selection of a more competent attorney to handle his death penalty case. However, the Illinois Supreme Court, which no doubt recognizes the qualitative difference between a death sentence and a prison sentence, already concluded that Mr. Madej did not meet the standard for proving ineffective assistance of counsel, despite his attorney's substandard performance during sentencing.

Although this court agrees with Petitioner on the absolute importance of implementing exacting standards of due process in death penalty cases, the court is not prepared to equate a Vienna Convention violation, under these circumstances, with a Miranda violation or a violation of the right to counsel because there is no legal precedent to support such an interpretation. Moreover, this court finds Petitioner's claims, that consular notification would have led to a better attorney and aggressive assistance from his consulate, to be mere speculation. For these reasons, the court must deny Petitioner's and the Consul General's request for vacatur of Mr. Madej's convictions and sentence, as well as the Consul General's request for resentencing.

Even though this court cannot grant Mr. Madej the relief he seeks, his petition has brought much needed attention to the importance of State compliance with the Vienna

Convention. In the past, noncompliance was due to a lack of awareness of such provisions. Presently, heightened awareness of a defendant's right to consular notification has prompted the Cook County State's Attorney's Office to implement certain curative measures regarding foreign national defendants. Beginning February 22, 1999, all foreign national defendants, as determined after review of the arrest report, any information provided by the I.N.S., or any other source of information, will be notified by an assistant state's attorney at the bond hearing or the first court date of the defendant's right to have his/her consulate notified while defendant awaits trial. If the judge does not ask the defendant if he understands this right or wishes his consulate to be notified, the assistant state's attorney must request the judge to make the inquiry. For every defendant who is given this admonition, a form letter must be sent out to the embassy or consulate of the defendant's native country. This admonition and written notification applies to all foreign nationals, whether charged with a felony or a misdemeanor, and whether in custody or on bond.

Accordingly, this § 2-1401 petition for post-judgment relief, or in the alternative, petition for relief from void orders, and the consolidated petition for writ of mandamus, shall be and is hereby denied.

ENTERED: s/ Thomas R. Fitzgerald
Hon. Thomas R. Fitzgerald
Presiding Judge of the Circuit
Court of Cook County
Criminal Division

DATED: May 3, 1999

APPENDIX C — LETTER OF THE SUPREME COURT OF ILLINOIS DENYING PETITION FOR REHEARING DATED NOVEMBER 27, 2000

SUPREME COURT OF ILLINOIS
SUPREME COURT BUILDING
SPRINGFIELD 62701

* * *

November 27, 2000

Mr. Charles F. Smith, Jr.
Skadden, Arps, Slate, Meagher & Flom
333 West Wacker Drive
Suite 2100
Chicago, IL 60606

No. 87725 — People State of Illinois et al., appellees, v.
87574 Gregory Madej, appellant (The Counsel
87726 General for the Republic of Poland of
87852 Chicago et al., intervenors/appellants).
Cons. Appeals, Circuit Court (Cook).

The Supreme Court today DENIED the petition for rehearing in the above entitled cause.

The mandate of this Court will issue to the appropriate Appellate Court and/or Circuit Court or other agency on December 7, 2000.

APPENDIX D — LETTER OF THE SUPREME COURT OF ILLINOIS STAYING MANDATE DATED DECEMBER 19, 2000

SUPREME COURT OF ILLINOIS
SUPREME COURT BUILDING
SPRINGFIELD 62701

* * *

December 19, 2000

Mr. Amarjeet S. Bhachu
Skadden Arps Slate Meagher & Flom
333 W. Wacker Drive, Suite 2100
Chicago, IL 60606

In re: People State of Illinois et al., appellees, v. Gregory Madej, appellant (The Counsel General for the Republic of Poland of Chicago et al., intervenors/appellants).
Nos. 87574, 87725, 87726 & 87852 Cons.

Today the following order was entered in the captioned case:

Motion by appellant to stay the mandate of this Court for federal habeas corpus proceedings which were filed in the United States District Court for the Northern District of Illinois. Motion Allowed. It is further ordered that appellant shall provide this Court with periodic reports on the status of the case in federal court by the first day of January, March, May, September and November while the case is pending in federal court.

Appendix D

A report shall contain information which identifies papers filed, including any motions for continuance or extension; hearing dates; and court rulings.

Order entered by Justice Fitzgerald.

Very truly yours,

s/ Juleann Hornyak
Clerk of the Supreme Court

cc: Hon. Jim Ryan
Ms. Arleen C. Anderson
Ms. S. Adele Shank
Mr. John Quigley
Mr. Ali Naseem Bajwa
Mr. Michael Engelhard
Mr. Walter A. Hess
Mr. Douglass W. Cassel, Jr.
Mr. Charles F. Smith, Jr.

Supreme Court, U.S.
FILED
APR 30 2001
OFFICE OF THE CLERK

(2)

No. 00-1375

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 2000

THE CONSUL GENERAL FOR THE REPUBLIC OF POLAND IN CHICAGO and GREGORY A. MADEJ
Petitioners
v.
ILLINOIS, JAMES M. SCHOMIG, Warden, Pontiac Correctional Center, DONALD P. O'CONNELL, Chief Judge of the Circuit Court of Cook County, and THE CIRCUIT COURT OF COOK COUNTY
Respondents

On Petition for a Writ of Certiorari to the Illinois Supreme Court

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BRIEF OF AMICUS CURIAE UNITED MEXICAN STATES IN SUPPORT OF PETITIONERS

Counsel to the United Mexican States

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Columbus, Ohio 43201

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Luke T. Lee, ***Consular Law and Practice*** (2d ed. 1991) 2-4

Multilateral Treaties Deposited with the Secretary-General (electronic version), Chap. III 2

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus curiae the United Mexican States (hereinafter, "Mexico") is a party to the Vienna Convention on Consular Relations. As a party, Mexico has an interest in securing compliance with rights guaranteed under Article 36 of the Convention by all states parties, both for its own nationals and for nationals of any other state party. As a member of the community of nations, Mexico has an interest in assuring compliance by all states with their obligations under treaties protecting individual rights. Under customary law and the International Covenant on Civil and Political Rights, states (1) must extend the protection of their laws to foreign nationals in their territory, (2) must avoid acts contributing to discrimination based on race or national origin, (3) accord fair treatment to detained foreign nationals, in particular in capital cases. Consent has been granted to the filing of this Brief. See Appendix.

RESERVATION

Nothing in this Brief shall be construed as a waiver of the immunity to which Mexico is entitled by virtue of international law or the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602, *et seq.*, or any immunity or privilege established by the Vienna Convention on Consular Relations, 21 U.S. Treaties 77; Treaties and Other International Acts Series 6820; 590 United Nations Treaty Series 261, and the Consular Convention between the United States and The United Mexican States, 57 Stat. 800; TS 985; 9 Bevans 1076; 125 United Nations Treaty Series 301, or of any defense, right, or immunity which Mexico may have a right to assert. It also will not imply a submission to the jurisdiction of the United States.

SUMMARY OF ARGUMENT[1/]

The Illinois Supreme Court acknowledged that Article 36 of the Vienna Convention on Consular Relations was violated,

1/ No part of this Brief was written by a party.

because Mr. Madej was not informed, upon his arrest, that he had a right to contact consular officials of Poland. Despite this violation, Mr. Madej was convicted of capital murder and sentenced to death. In such a circumstance, a reversal of both conviction and sentence is required. A court may not interpose a requirement that prejudice be shown as a condition for reversal. Nor may it invoke rules of procedural default to avoid providing a remedy.

ARGUMENT

I
THE VIENNA CONVENTION ON CONSULAR RELATIONS IS A KEY PROTECTION FOR FOREIGN NATIONALS

The Vienna Convention on Consular Relations is the major worldwide treaty governing consular relations, regulating all aspects of the relationship of foreign consuls to a host government and setting the framework for a consul's activities. The result of the Conference on Consular Relations convened by the United Nations General Assembly in 1963, the Vienna Convention has been ratified by 165 nations. ***Multilateral Treaties Deposited with the Secretary-General***, Chap. III. Mexico, like both the United States and Poland, attended the 1963 conference, ratified the resulting treaty, and is a party. The Vienna Convention "was undoubtedly the single most important event in the history of the consular institution. Indeed, after 1963, there can be no settlement of consular disputes or regulation of consular relations, whether by treaty or national legislation, without reference or recourse to the Vienna Convention." Luke T. Lee, ***Consular Law and Practice***, at 26.

Article 36 of the Vienna Convention requires a host state to facilitate access between detained foreign nationals and consulates of the sending state, in particular by informing a detainee promptly upon detention of the right of access. The rationale underlying Article 36 of the Vienna Convention is that a foreign national is disadvantaged when left to navigate the

foreign county's legal system in the absence of support from his home nation, even if he is represented by competent local counsel. An exposition of the many ways in which a consul can assist a conational is found in the U.S. State Department's ***Foreign Affairs Manual***. Section 421 requires regular visitation. Section 421.3 sets forth the purposes of regular visitation:

> (h) To impress upon host country prison directors that the U.S. Government is sincerely interested in the welfare of its incarcerated citizens, no matter what the charges against them might be or of what they were convicted. (i) To maintain liaison and nurture rapport and a cooperative relationship with host country prison directors, law enforcement officials, prosecutors and judges. (j) To let the prisoners themselves know that their government has a sincere interest in their physical and emotional well-being.

Section 423.3 establishes the case worker concept, and requires that:

> To the extent possible the same consular officer should visit a prisoner regularly. There are several advantages to such a 'case worker' approach. The consular officer becomes thoroughly familiar with the specific facts and problems of the prisoner's situation. This should enable the officer to become responsive in the maximum degree to the prisoner's needs, not only small services, but also for effective liaison with attorneys, court officials, and prosecutors. . . .

The State Department's view of consular services obviously encompasses matters beyond the development and presentation of evidence. The ***Foreign Affairs Manual*** also calls for continued liaison services for convicted prisoners engaged in appeals (§ 433) and continued regular visitation of prisoners at intervals "at least once every three months." Luke Lee, ***Consular Law and Practice***, at 169-71.

The importance of consular assistance to a detainee in a criminal case is indicated by the practice of U.S. consular officials in protecting the rights of Americans detained abroad. In instructions issued to consular officials, the State Department says:

> "In order for the consular official to perform the protective function in an efficient and timely manner, it is essential that the consul obtain prompt notification whenever a United States citizen is arrested. Prompt notification is necessary to assure early access to the arrestee. Early access in turn is essential, among other things, to receive any allegations of abuse [and] to provide a list of lawyers and a legal system fact sheet to prisoners." *Overseas Citizens Services*, §411, in 7 ***Foreign Affairs Manual*** (chap. 400, July 18, 1980), also in ***Digest of United States Practice in International Law*** (Washington, D.C., 1980), and in Luke T. Lee, ***Consular Law and Practice***, at 166. "Upon receiving notification that an American citizen is being detained, it is absolutely essential that the post achieve timely access to the detainee . . . ." *Id.* §412.

U.S. consular officials are further instructed to inform the detained American in detail about the processes they face. "Posts should prepare an information packet covering initial arrest, remand procedure, trial procedure, appeal process, and penal conditions and rules. The purpose of this material is not to usurp the function of legal counsel or encourage a 'do it yourself' approach. Rather, it serves the purpose of helping arrestees understand what is happening to them and provides a yardstick against which they can measure attorney performance. Such informational material should be updated regularly." *Id.* §413.4.

II
REVERSAL IS REQUIRED IF A CONVICTION FOLLOWS NON-COMPLIANCE WITH ARTICLE 36

If a criminal conviction is secured in absence of compliance with Article 36 of the Vienna Convention, the

conviction must be reversed. The violation is at once of the rights of the detainee, and of those of the foreign state, here Poland. Both violations must be remedied by the courts. In the first case to reach this Court in which a foreigner's treaty-guaranteed rights were violated by a state of the United States of America, the Court required compliance with the treaty. The treaty in question was that by which the United States of America gained its independence from Great Britain. The treaty required respect for the property rights of British nationals. A Virginia statute had been adopted to confiscate the property of British nationals. When a British national sued to regain his property, the Supreme Court struck down the Virginia statute, thereby vindicating the rights both of Great Britain and of the British national. ***Ware v. Hylton***, 3 U.S. (3 Dall.) 199 (1796).

In criminal cases as well, this Court has taken remedial action to ensure compliance with a treaty. In ***United States v. Rauscher***, 119 U.S. 407 (1886), the Court refused to allow a prosecuting attorney to charge an additional offense against an individual surrendered to the United States under an extradition treaty for another offense, because to do so would violate the treaty under which the man had been surrendered.

The practice of this Court as reflected in ***Rauscher*** is consistent with obligations imposed under the Vienna Convention itself. Article 36 of the Vienna Convention requires remedial action by the courts of state parties. In the second paragraph of Article 36, the state parties agree that their courts will secure strict compliance with the first paragraph of Article 36. The second paragraph states:

> The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.

This language requires domestic judicial implementation that ensures that "full effect" be given to the purposes of the right of

notification. "Full effect" is not given to the purposes of the right of notification if a conviction is allowed to stand despite a failure to notify.

Even apart from Article 36, paragraph 2, of the Vienna Convention, a remedy is required by international customary law, which operates as a complement to treaty obligations in this situation. If a treaty imposes obligations but does not specify remedies in the event of breach, such remedies are provided by international customary law. In the event of breach, if it is physically possible to restore the situation as it stood prior to the violation, such is required. A state that commits an internationally wrongful act must, to the extent possible, restore the *status quo ante*. This norm has been explained and put into draft treaty form by the International Law Commission, the United Nations body that drafts treaties. As stated by the International Law Commission, the required remedy is restitution in kind, often referred to in its Latin version, *restitutio in integrum*. *Draft Articles on State Responsibility*, article 43, ***Report of the International Law Commission on the work of its forty-eighth session 6 May-26 July 1996***, United Nations General Assembly Official Records, Supplement No. 10, at 142, U.N. Document A/51/10 (1996). As regards consular access, this requirement means that if a person has been convicted in violation of the right to be informed of the right of consular access, the conviction must be reversed.

III
WHEN ARTICLE 36 IS VIOLATED, PREJUDICE IS PRESUMED

Mexico can indicate to this Court that, according to its information, intervention by Mexican consuls has been a decisive factor, in a number of cases, in keeping Mexican nationals from being sentenced to death. However, such results are irrelevant to the issue before this Court. Under Article 36 of the Vienna Convention, there need be no showing in a particular case, before

remedial action is ordered, that a different result would have been achieved through consular intervention.

Article 36 was written into the Vienna Convention on the presumption that a failure to inform a detained foreign national of the right of consular access effected an injury to that individual in the exercise of the right of criminal defense. Indeed, there can be no other reason why the states participating in the drafting conference included such a provision. They were concerned that, unless detaining authorities made it clear to detained foreign nationals that they have a right of consular access, and that the detaining authorities are prepared to facilitate contact with a consular officer, a fair criminal process could not be assured.

Moreover, after a person has been convicted without having been informed of the right of consular access, it is difficult to determine what effect a consul may have had on the proceedings, since the variety of consular activity is great, and one never knows what a consul might have done in a particular case. In addition, if the courts were to undertake such an examination, they would need access to consular records and the testimony of consuls, both of which are privileged under consular law. Once it is determined that there has been a violation of the right to notice and consular access, relief should be granted to the accused without further inquiry.

The need to restore the *status quo ante* is particularly acute in capital cases. Article 6 of the International Covenant on Civil and Political Rights requires protection of the right to life, stating: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." In the context of a capital case, this provision means that a death sentence must be reversed if all procedural requirements have not been met.

The Human Rights Committee, which was established under the International Covenant on Civil and Political Rights to monitor compliance, has ruled that in capital cases, Article 6

requires heightened regard to procedural requirements, and that if such requirements are not scrupulously observed, the imposition of a death penalty is rendered "arbitrary" within the meaning of Article 6. Communication No. 353/1988, ***Lloyd Grant v. Jamaica***, Report of the Human Rights Committee, Vol. II, United Nations General Assembly, U.N. Document A/49/40 (1994), at 57; Communication No. 377/1989, ***Anthony Currie v. Jamaica***, Report of the Human Rights Committee, Vol. II, United Nations General Assembly, U.N. Document A/49/40, at 78.

The purpose of the Article 36 notification requirement is not to discriminate against the nationals of the receiving state by giving foreign nationals greater protection, but rather to assure that foreigners are afforded equal guarantees in exercising the right of defense. From these considerations it follows that a requirement of a finding of prejudice aggravates the situation of disadvantage in which a detained foreign national finds him- or herself, in particular in capital cases.

IV
THE INTER-AMERICAN COURT OF HUMAN RIGHTS HAS CONSTRUED ARTICLE 36 TO REQUIRE REVERSAL OF A CAPITAL SENTENCE IMPOSED FOLLOWING A VIOLATION OF ARTICLE 36

The obligation to reverse a capital conviction was affirmed by the Inter-American Court of Human Rights in an advisory opinion the Court issued at the request of Mexico. ***The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law***, Advisory Opinion OC-16/99, Inter-American Court of Human Rights, October 1, 1999. Mexico asked the Court to give an opinion on consular notification in capital cases. The Court stated that Article 36 provides a right that the individual may invoke before a domestic court, and that the relevant information must be communicated at the time the person is first deprived of liberty. Para. 106.

A failure to provide that information, said the Court, is a violation of due process, since the accused is conclusively presumed to be disadvantaged and must be placed on a par with others through access to a consulate. Para. 120. The Court said that, for an accused person, "notification of the right to communicate with a consular official of his country will materially improve his possibilities of a defense," and "procedural measures, including those taken by the police, will be done with greater concern for legality and greater respect for the dignity of the person." Para. 121. The Court said that the right to be informed of the right of consular access "is a means of defense for the accused that is reflected, on occasion in a determinative way, in the respect shown for his other procedural rights." Para. 123. The Court said that imposition of a death sentence without compliance with Article 36 is an arbitrary deprivation of life, in violation of the International Covenant on Civil and Political Rights, and of the American Convention on Human Rights. Para. 137.

V
ILLINOIS RULES ON DEFAULT CANNOT BE APPLIED

The Illinois Supreme Court refused to entertain Petitioner's Article 36 claim on the ground that he had not raised it in accordance with Illinois rules of procedure. The violation of a right guaranteed by a treaty between sovereign nations is not, however, subject to the considerations that allow a state court to refuse to entertain a claim. The Supremacy Clause, Article VI, cl. 2, was written into the Constitution precisely to prevent the states from thwarting the operation of treaties. In the context of action by the states in contradiction to treaty obligations, this Court has recognized that a case involving a treaty obligation is a case of the highest priority. In nullifying the operation of a Virginia statute on the basis of a treaty obligation, this Court said, "The case is of very great importance . . . because the effect and operation of the treaty are necessarily involved." ***Ware v. Hylton***, 3 U.S. (3 Dall.) 199, 221 (1796). This is not to say that, where the treaty has been given full effect, i.e., where notice to the detainee is provided and consular access allowed, states rules of procedural default could

not be given effect. However, procedural default cannot be used to negate the treaty obligations of the United States.

The Illinois courts must remedy the treaty violation if the issue is presented to them. Here, they failed to do so. In order to ensure compliance with the treaty obligation, Mexico respectfully urges this Court to direct the Illinois courts to provide a remedy.

VI
CONCLUSION

The courts must entertain claims based on Article 36 of the Vienna Convention on Consular Relations. Rules of default of claims cannot be invoked by a court to refuse to remedy a violation. A failure to remedy the instant violation of the Vienna Convention on Consular Relations at the earliest opportunity perpetuates the breach of duty that has been committed here. A criminal conviction obtained after Article 36 of the Vienna Convention on Consular Relations is violated must be reversed.

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CERTIFICATE OF SERVICE

On May 1, 2001, three copies each of this Brief were served by first class mail, postage prepaid, on Douglass Cassel, 357 E. Chicago Ave., Chicago IL 60601, counsel to Petitioner Consul General; Charles F. Smith, 333 W. Wacker Dr., Suite 2100, Chicago IL 60606, counsel to Petitioner Madej; Arleen C. Anderson, Assistant State's Attorney, 2650 S. California, Chicago IL 60608, counsel to Respondents.

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APPENDIX A-1
No. 00-1375
IN THE
SUPREME COURT OF THE UNITED STATES
October Term 2000

THE CONSUL GENERAL FOR THE REPUBLIC OF POLAND IN CHICAGO and GREGORY A. MADEJ
Petitioners

v.

ILLINOIS, JAMES M. SCHOMIG, Warden, Pontiac Correctional Center, DONALD P. O'CONNELL, Chief Judge of the Circuit Court of Cook County, and THE CIRCUIT COURT OF COOK COUNTY
Respondents

On Petition for a Writ of Certiorari
to the Illinois Supreme Court

CONSENT OF RESPONDENTS TO FILING

Undersigned counsel to Respondents hereby consents, pursuant to Rule 37 of this Court, to the filing of a brief *amicus curiae* in support of Petitioners by the United Mexican States.

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APPENDIX A-2
No. 00-1375
IN THE
SUPREME COURT OF THE UNITED STATES
October Term 2000

THE CONSUL GENERAL FOR THE REPUBLIC OF POLAND IN CHICAGO and GREGORY A. MADEJ
Petitioners
v.
ILLINOIS, JAMES M. SCHOMIG, Warden, Pontiac Correctional Center, DONALD P. O'CONNELL, Chief Judge of the Circuit Court of Cook County, and THE CIRCUIT COURT OF COOK COUNTY
Respondents

On Petition for a Writ of Certiorari
to the Illinois Supreme Court

CONSENT OF PETITIONERS TO FILING

Undersigned counsel to Petitioners hereby consent, pursuant to Rule 37 of this Court, to the filing of a brief amicus curiae in support of Petitioners by the United Mexican States.

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No. 00-1875

Supreme Court, U.S.
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MAY 1 2001
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In the Supreme Court of the United States

THE CONSUL GENERAL FOR THE REPUBLIC OF POLAND IN CHICAGO and GREGORY A. MADEJ,

Petitioners,

vs.

ILLINOIS, JAMES M. SCHOMIG, Warden, Pontiac Correctional Center, DONALD P. O'CONNELL, Chief Judge of the Circuit Court of Cook County, and THE CIRCUIT COURT OF COOK COUNTY,

Respondents.

On Petition for Writ of Certiorari to the Illinois Supreme Court

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18pp

QUESTION PRESENTED FOR REVIEW

Whether a grant of certiorari is warranted in this case where the Illinois Supreme Court's decision, on its face, indicates that it is based on *bona fide* separate, adequate, and independent state grounds; where, in its decision, the Illinois Supreme Court acted within this Court's precedents; and where the petition poses no important, properly presented question of federal law?

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STATUTE:

735 ILCS 5/2-1401 . . . . . *passim*

OPINIONS BELOW

The opinion of the Illinois Supreme Court is reported as *People v. Madej*, 193 Ill. 2d 395, 739 N.E.2d 423 (2000).

JURISDICTION

Petitioners claim jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioners' statement of constitutional and statutory provisions is complete and correct.

STATEMENT OF THE CASE

Procedural Background

Petitioner Gregory Madej [hereinafter "Madej"] was sentenced to death upon his conviction for murder, rape, deviate sexual assault and armed robbery in 1982. The Illinois Supreme Court affirmed his convictions and sentences in *People v. Madej*, 106 Ill. 2d 201, 478 N.E.2d 392 (1985) [*"Madej I"*], *cert. denied sub nom. Madej v. Illinois*, 474 U.S. 106 S.Ct. 268 (1985), *reh'g denied*, 474 U.S. 1038, 106 S.Ct. 608 (1985). Subsequently, the Circuit Court of Cook County denied Madej's amended petition for relief filed pursuant to the Illinois Post-Conviction Hearing Act. The Illinois Supreme Court affirmed the denial of post-conviction relief in *People v. Madej*, 177 Ill. 2d 116, 685 N.E.2d

908 (1997) ["*Madej II*"], *cert. denied sub nom. Madej v. Illinois*, 523 U.S. 1098, 118 S. Ct. 1565 (1998).

In 1998, Madej filed in the Illinois Supreme Court a motion for leave to file a petition for an original writ of *mandamus*, seeking relief pursuant to Article IV, Section 4(a) of the Illinois Constitution and Supreme Court Rule 381. *Madej v. O'Connell*, No. 85534. He based this motion on the claim at issue in this cause—that the State of Illinois violated his rights under Article 36 of the Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820 [the "Vienna Convention"] and Article 29 of the Consular Convention, May 31, 1972, U.S.—Pol., 24 U.S.T. 1231, T.I.A.S. No. 7642 [the "Consular Convention"]. The Republic of Poland filed a formal diplomatic note with the United States Department of State on June 10, 1998, expressing concern over the Vienna Convention transgression. The Illinois Supreme Court denied Madej's motion.

Thereafter, Madej filed a petition for post-judgment relief pursuant to 735 ILCS 5/2-1401 [hereinafter "§ 2-1401 petition] in the Criminal Division of the Circuit Court of Cook County, as well as a petition for writ of *mandamus* pursuant to 735 ILCS 5/14-101 in the Chancery Division of the Circuit Court of Cook County. Presiding Judge Albert Green transferred the chancery case to the Criminal Division for consolidation with the criminal case after granting the Polish Consul General's motion for intervention.

In the consolidated matter, then-presiding Judge Thomas R. Fitzgerald entered judgment denying both petitions without an evidentiary hearing on May 5, 1999. Judge Fitzgerald also denied the Polish Consul

General's request to intervene in the criminal matter. However, inasmuch as the Chancery Division had allowed the Consul General to intervene, Judge Fitzgerald took the Consulate's petition into consideration in his ruling. Ultimately, Judge Fitzgerald concluded that the § 2-1401 petition was barred by the two-year statute of limitations, and that the *mandamus* petition failed because such a cause of action may not be used as a substitute for seeking traditional post-judgment relief in a criminal case when the issues and relief sought are the same. In an alternative holding, Judge Fitzgerald noted that even were the claims properly raised, his Consular Convention claim would fail because there was no violation of that treaty, and the Vienna Convention claim would not succeed because, although the State did violate Article 36 by failing to advise Petitioner of his right to speak to the Polish Consulate, Madej nonetheless failed to show that the denial of consular notification rights prejudiced or otherwise changed the outcome of his trial. Also assuming, *arguendo*, that the *mandamus* action had survived the procedural barriers, Judge Fitzgerald found that it too would fail for the same reasons as the § 2-1401 petition.

Upon appeal to the Illinois Supreme Court, that court granted Petitioners' motion to consolidate the cases on appeal. The United Mexican States, the Federal Republic of Germany, and The Human Rights Committee of the Bar of England and Wales were granted leave to file amicus briefs in support of Petitioners.

The Illinois high court concluded that Petitioners' § 2-1401 petition was time-barred. It also rejected, under state law, Petitioners' argument that the petition was

not time-barred because: 1) Madej's conviction and sentence are void under customary international law; 2) the Consul General "only recently became aware that the State of Illinois had tried and sentenced its national to death"; and 3) the State of Illinois fraudulently concealed from Madej the fact that the Vienna Convention gave him the right to consular assistance. The Illinois court also found that, based on this Court's precedent and the language of the treaty itself, both which indicate that the procedural rules of the forum state court's rules and regulations govern the implementation of the treaty in that state, § 2-1401's statute of limitations does not violate international law. Finally, the court concluded that, under state law, *mandamus* relief was not appropriate in Petitioners' case.

Statement of Facts

Ms. Doyle's naked body was found in an alley on the north side of Chicago in the early morning hours of August 23, 1981. *Madej II*, 177 Ill.2d at 123-24. She had been stabbed and slashed 34 times. *Id.* at 124. A post-mortem examination revealed the presence of numerous abrasions over various parts of her body as well as semen in her vagina[1] and rectum. *Id.* Petitioner was arrested in Ms. Doyle's automobile after a high-speed chase. *Id.* His hands, head, shirt, pants and undershorts were splattered with blood, as was Ms. Doyle's

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[1] DNA testing done earlier this year at the Centre of Forensic Sciences in Toronto, Ontario revealed that the source of the spermatozoa from Barbara Doyle's vaginal slide and Gregory Madej's genetic profile are the same.

car, mostly in the area of the passenger's seat. *Id.* Upon searching the vehicle, police recovered a large knife as well as Ms. Doyle's jeans and blouse, both of which were saturated in blood. *Id.*

Gregory Madej's Personal History

Gregory Madej was born in Kielce, Poland on August 25, 1959. (Pet. app'x vol. I, ex. F-6, p. A 104.)[2] Both of his parents were born and raised in Poland. (*Id.*). In 1960, when Madej was less than a year old, his father, Kazamier Madej, came to the United States to look for work. (*Id.* at pp. A 104, A 111). He settled in Chicago and soon obtained work as a laborer. (*Id.* at p. A 104). In March, 1961, he sent for his wife, Helena, and his son, Gregory, who was then a year and a half old. (*Id.*).

Neither Madej nor his parents ever became naturalized American citizens. (*Id.* at p. A 111). At the time of his arrest, Madej was classified in this country as a lawful permanent resident alien. (*Id.* at ex. K, p. A 332).

Madej grew up in two different cultures. (*Id.* at ex. F6, p. A111). As a child, he attended Polish school every Saturday, where he learned the history and culture of Poland, and to read and write the Polish language. (*Id.*). At home with his family, where Polish was always spoken, a strong effort was made to retain the

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[2] Citations to this exhibit are to a social history investigative report prepared by Jill Miller, MSSW, who was retained by petitioner's attorney on post-conviction review. The exhibit was included in the Appendix Petitioner's filed in the Illinois Supreme Court.

family's ethnic identity. (*Id.*). During the summers of 1973 and 1974, Madej and his brother even had the opportunity to spend time in Poland visiting relatives. (*Id.* at p. A 106). Back in Chicago, however, at school and in the community, Madej was part of the mainstream American culture. (*Id.* at p. A 111). Indeed, literature of second generation Poles addresses their need to eschew their own culture and identify with the American culture. (*Id.*). Madej's cousin, Roman, who moved to Chicago in 1973 and lived with the family from 1973 until 1978, believed that part of the problem Gregory had with his father[3] was cultural . . . "'his father doesn't speak English . . . he didn't understand Greg.'" (*Id.* at p. A 107). Moreover, as late as 1991, Madej expressed strong anti-communist views, which social investigator, Jill Miller, theorized was "undoubtedly a product of his native country's history." (*Id.*).

Madej attended various local grade schools as a child in Chicago. (*Id.* at p. A 109). Through the eleventh grade, until he enlisted in the United States Army, he attended Foreman High School, where he participated in ROTC. (*Id.* at pp. A 109, A 112). While in the Army, he spent time in Korea and earned his GED. (*Id.* at p. A 112). In 1977, he was granted an honorable discharge and returned home to Chicago. (*Id.*). In June, 1977, Madej enrolled at Triton College, but withdrew in late fall of that year, citing financial difficulties. (*Id.* at p. A 109). As his "rap sheet" indicates, this time period marked the beginning of a long string of arrests that

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[3] *See Madej II*, 177 Ill. 2d at 130 (describing opinion of petitioner's psychiatric expert that petitioner was "physically and verbally abused" by his father).

culminated in Madej's arrest for Barbara's Doyle's murder in 1981. (*Id.* at Ex. F10, p. A 143).

Madej left Chicago in late summer, 1978, and traveled around the United States for several months. (*Id.*). He spent a couple months in California where he worked part-time, doing odd jobs. (*Id.*). He returned to Chicago for a while in late 1978, and was then arrested for theft and sentenced to one year probation. (*Id.* at p. A 112; ex. F10, p. A 143). Madej then went back to California, but in February 1979, returned to Chicago. Shortly thereafter, he was arrested again, found to be in violation of probation, and sentenced to 18 months in the Illinois Department of Corrections. (*Id.* at pp. A 112, A 116, A 143-44).

Madej had only been on parole for approximately eleven months when he was arrested for the murder of Barbara Doyle. (*Id.* at p. A 115). When he was taken into custody, he was read his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966) and interrogated as to his activities on the day of the murder. *Madej I*, 106 Ill. 2d at 208. At no time was Madej advised of any consular notification rights under the Vienna or Consular Conventions. (C. 273).

An assistant public defender was originally appointed to represent Madej. (Rpt. from 1st p.c. proc'gs, Aug. 12, 1993, vol. 6, p. 8). However, Madej discharged that attorney and his family retained Phillip Igoe, a Chicago attorney, to represent him. (*Id.*). Igoe continued to represent Madej through his trial and sentencing hearing. (Pet. app'x vol. I, ex. F 1, p. A 67).

REASONS FOR DENYING THE WRIT

I

THE ILLINOIS SUPREME COURT'S DECISION ON ITS FACE INDICATES THAT IT IS BASED ON BONA FIDE SEPARATE, ADEQUATE, AND INDEPENDENT STATE GROUNDS AND, THEREFORE, PURSUANT TO *MICHIGAN v. LONG*, 463 U.S. 1032 (1983), THIS COURT SHOULD NOT UNDERTAKE TO REVIEW THE DECISION OF THE ILLINOIS COURT.

This case presents a jurisdictional question that the Court need address before reaching any question concerning the Vienna Convention on Consular Relations. This Court will not review a question of federal law raised in a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment. *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). This rule applies whether the state law ground is substantive or procedural. *Id.* In the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional. *Id.* Because this Court has no power to review a state law determination that is sufficient to support the judgment, resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory. *Id.*

A. *735 ILCS 5/2-1401; Relief from judgment*

In the present case, the Illinois Supreme Court found that Petitioners' § 2-1401 petition was time-barred. (Appendix A to Cert. Pet. at 5a-6a). The court then addressed each of Petitioners' claimed exceptions to § 2-1401's statute of limitations. Each is addressed below.

1. *Under international law, Gregory Madej's conviction and sentence are void.*

Although acknowledging that *restitutio in integrum* plays an important role in international law, the Illinois Supreme Court noted that Petitioners had failed to cite to any authority to support a conclusion that the principle renders Madej's conviction and death sentence void. (*Id.* at 7a). The court then plainly stated that, under Illinois law, "an order is void if it was entered by a court that lacked jurisdiction of the parties or of the subject matter or that lacked the inherent power to make or enter the particular order involved." (*Id.*, citing *R. W. Sawant & Co. v. Allied Programs Corp.*, 111 Ill. 2d 304, 309 (1986)). The state high court then noted that the trial court clearly had jurisdiction of the parties and of the subject matter and the inherent power to make or enter the orders involved. (*Id.*). Consequently, the supreme court refused to conclude that Madej's conviction and sentence are void under state law. (*Id.*).

2. *The Consul General only recently became aware that the State of Illinois had tried and sentenced Madej to death.*

Noting that its own case law is clear, the Illinois Supreme Court held that the two-year limitation period mandated by § 2-1401 must be adhered to in the absence of a clear showing that the person seeking relief is under legal disability or duress or the grounds for relief are fraudulently concealed. (*Id.* at 8a, citing *People v. Caballero*, 179 Ill. 2d 205, 211 (1997)). Concluding that the Consul General was not alleging any of the above, the court plainly stated that, under state law,

the Consul General was not entitled to seek relief under § 2-1401 outside of the limitation period. (*Id.*).

3. *Allegation that State fraudulently concealed fact that Vienna Convention gave Madej right to consular assistance.*

The Illinois Supreme Court held that to toll the limitation period of § 2-1401, the alleged fraud must consist of "'affirmative acts or representations designed to prevent discovery of the cause of action or ground for relief.'" (*Id.* at 9a, citing *Cromwell v. Bilandic*, 81 Ill. 2d 422, 428 (1980)). The court then went on to hold that even if it accepted Petitioners' contention that the State was obligated to inform Madej of his rights under the Vienna Convention, it could not conclude that the State's failure to do so constituted fraud under state law because the rights are a matter of public record. (*Id.*).

B. *Mandamus Proceeding*

Acknowledging that Petitioners' action may involve issues of "'great public importance and of great importance to the administration of justice,'" the Illinois Supreme Court nonetheless found that, "in and of itself," that is not a reason to grant *mandamus* relief. (*Id.* at 11a). The court noted that under Illinois law, it would not issue a writ of *mandamus* absent a showing of "'a clear, affirmative right to relief, a clear duty of the [public officer] to act, and clear authority in the [public officer] to comply with the writ, and concluded that absent such a showing, it must refuse to issue a writ. (*Id.*, citing *Lewis E. v. Spagnolo*, 186 Ill. 2d 198, 229 (1999)).

C. *Conclusion*

In conclusion, the Illinois Supreme Court's decision on its face constitutes a plain statement that it is based on bona fide separate, adequate, and independent state grounds. Therefore, pursuant to *Michigan v. Long*, 463 U.S. 1032 (1983), this Court should not undertake to review the decision of the Illinois Supreme Court.

II.

APPLYING THE RULE 10(c) CRITERIA, THERE IS NO BASIS FOR CERTIORARI. THERE IS NO CONFLICT WITH ANY DECISION OF THIS COURT. THERE IS NO IMPORTANT, PROPERLY PRESENTED QUESTION OF FEDERAL LAW.

In the Illinois Supreme Court, as well as in this Court, Petitioners argued that a domestic court's reliance on a procedural rule to bar their cause of action violates international law. Relying on this Court's precedents and the plain language of the treaty itself, the Illinois Supreme Court concluded that because the Vienna Convention specifically states that the forum court's rules and regulations will govern the implementation of the treaty in that state, it would refuse to conclude that the reasonable limitation period of § 2-1401 violates international law. (*Id.* at 10a), citing *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 700 (1988); *Breard v. Greene*, 523 U.S. 371, 375 (1998)). Moreover, as this Court also noted in *Breard*, "[a]lthough treaties are recognized by our Constitution as the supreme law of the land, that status is no less true of provisions of the Constitution itself, to which rules of procedural default apply." 523 U.S. at 376. Accordingly, the Illinois Supreme Court's reliance on a

procedural rule to bar a cause of action does not violate international law any more than it would violate American constitutional law.

In sum, the Illinois Supreme Court acted within this Court's precedents. Accordingly, this Court should not undertake to review the decision of the Illinois Supreme Court.

III.

THE CONSUL GENERAL CANNOT BRING A PRIVATE RIGHT OF ACTION IN UNITED STATES COURTS TO SET ASIDE A CRIMINAL CONVICTION AND SENTENCE FOR VIOLATION OF CONSULAR NOTIFICATION PROVISIONS AND, THEREFORE, THIS COURT SHOULD NOT REVIEW THE DECISION OF THE ILLINOIS SUPREME COURT.

The Consul General does not have standing to attack Madej's conviction and death sentence for violation of consular notification provisions. As this Court held in *Breard v. Greene*, 523 U.S. 371, 377 (1998), "neither the text nor the history of the Vienna Convention clearly provides a foreign nation a private right of action in the United States' courts to set aside a criminal conviction and sentence for a violation of consular notification provisions." *See also Federal Republic of Germany v. United States*, 526 U.S. 111, 112 (1999). This constitutes yet another reason this Court should not undertake to review the decision of the Illinois Supreme Court.

CONCLUSION

For all the reasons stated above, Respondent respectfully requests that this Honorable Court deny the petition for writ of certiorari.

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IN THE

Supreme Court of the United States

THE CONSUL GENERAL FOR THE REPUBLIC OF POLAND IN CHICAGO and GREGORY A. MADEJ,

Petitioners,

v.

ILLINOIS, JAMES M. SCHOMIG, Warden, Pontiac Correctional Center, DONALD P. O'CONNELL, Chief Judge of the Circuit Court of Cook County, and THE CIRCUIT COURT OF COOK COUNTY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS SUPREME COURT

REPLY BRIEF

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The Consul General for the Republic of Poland in Chicago (the "Consul General") and Gregory Madej (collectively, the "Petitioners"), pursuant to Supreme Court Rule 15.6, respectfully submit this reply to the Respondents' Brief in Opposition (the "Opposition") to the Petition for a Writ of Certiorari (the "Petition").[1]

The Opposition is more notable for what it does *not* say than what it does say. Rule 15.2 of this Court requires a brief in opposition to "address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted." S. Ct. R. 15.2. Given Respondents' almost complete failure to contest the compelling arguments made in support of the Petition, this Court should grant *certiorari*.

I. THERE IS NO ADEQUATE AND INDEPENDENT STATE GROUND BARRING REVIEW

With respect to procedural matters raised by the Opposition, it is important to begin by noting what the Respondents do not say. The Respondents do not contest any of the following points:

- This is not a last-minute request for review prior to a scheduled execution, and the Consul General has acted expeditiously to vindicate his rights under the Vienna Convention;
- This Court has jurisdiction under 28 U.S.C. § 1257;
- The Antiterrorism and Effective Death Penalty Act of 1996 does not apply;

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1. Capitalized terms not otherwise defined herein have the meanings ascribed to them in the Petition.

- The retroactivity doctrine of *Teague v. Lane*, 489 U.S. 288 (1989) is not applicable;

- Eleventh Amendment principles are not implicated by this appeal; and

- Gregory Madej has standing to pursue this appeal.[2]

See Petition at 24-25. Accordingly, the Respondents concede that many of the issues that lead this Court to deny *certiorari* in *Breard v. Greene*, 523 U.S. 371 (1998) and *Federal Republic of Germany v. United States*, 526 U.S. 111 (1999), are not present in this case. Instead, the Respondents pin their hopes on the argument that there is an adequate and independent state ground barring review. For the reasons discussed below, the Respondents' argument fails.

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2. As a result of this last concession, the Respondents' contention that the Republic of Poland does not have standing to pursue this appeal is not outcome determinative. *See* Petition at 25 (this case cannot turn on standing unless court adopts rule that no one may enforce treaty rights in court). Petitioners believe this position to be erroneous in any event and are prepared to address it on the merits. *See, e.g.*, *Wildenhus's Case*, 120 U.S. 1, 16 (1887) (noting there is "no reason why" consul general may not enforce rights arising from treaty); *Nielsen v. Johnson*, 279 U.S. 47, 51-52 (1929) (rights afforded party pursuant to an international treaty are to be liberally construed). Even if the Vienna Convention itself did not provide a right of action, the Consular Convention in effect between the Republic of Poland and the United States does. *See* Consular Convention, May 31, 1972, U.S.-Pol., art. 23, 24 U.S.T. 1231, T.I.A.S. No. 7642 (United States agrees Polish consular official can "address himself to the courts and other authorities of the receiving State" in order to "protect the rights and interests of the sending State and of its nationals").

A. The Respondents Do Not Address the Fact that the State Ground Asserted Is Not "Independent"

The Petition explained that there was no independent state ground barring review. Petition at 26-27. Specifically, the Petitioners noted that, as a procedural matter under Illinois law, a void order may be collaterally attacked at any time. *City of Chicago v. Roman*, 705 N.E.2d 81, 85 (Ill. 1998). Petitioners argued that as a substantive matter under international law, Gregory Madej's convictions and death sentence were void under the principle of *restitutio in integrum* (and thus, as a procedural matter could be collaterally attacked). The Illinois Supreme Court decided that Gregory Madej's convictions and death sentence were *not* void under international law, and therefore could not be collaterally attacked. (App. 7a) Clearly this decision did not rest on independent state grounds, as it required the Illinois Supreme Court to interpret international law.

The Opposition concedes that the Illinois Supreme Court addressed the application of international law. *See* Opposition at 9. However, the Opposition does not address how the Illinois Supreme Court's interpretation of international law amounts to an "independent" state ground. There is no dispute that state procedural law permits a collateral attack of a void order; the real dispute is whether, as a substantive matter, the international law of remedies renders the orders entered in this case void. The Petitioners believe the Illinois Supreme Court's analysis of international law and its application to this case was erroneous, and requires further review.

Second, the Opposition also does not begin to address how the denial of *mandamus* relief by the Illinois Supreme Court on the ground that the Petitioners had not shown a "clear, affirmative right to relief," Opposition at 10,

can possibly constitute an "independent" state ground barring review of the federal right asserted. *See* Petition at 27 (citing *Hildwin v. Florida*, 490 U.S. 638, 639 n.* (1989) (*per curiam*)).[3] The Respondents' total failure to respond to these arguments demonstrates that no independent state ground exists.

B. The State Grounds Asserted Are Not "Adequate" to Bar Review

Even if independent, a state law ground is not sufficient to preclude review by this Court where the grounds relied on are not firmly established or regularly followed. *Ford v. Georgia*, 498 U.S. 411, 423-24 (1991). Such is the case here.

First, as the Opposition notes, with respect to the *Mandamus* Petition, the Petitioners argued that they also were entitled to *mandamus* relief under a line of decisions that permitted the Illinois Supreme Court to issue *mandamus* relief when confronted with an issue of great public importance or an issue of great importance to the administration of justice.[4] Despite a long line of authority permitting *mandamus* relief to issue in these circumstances, the majority opinion, without citation to any authority, announced that the fact that the issues raised may have been of great public importance and of great importance to the administration of justice was not sufficient to sustain a

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3. A showing of a clear, affirmative right to relief under Illinois' *mandamus* statute would not require a showing of compliance with a statute of limitations or other such similar procedural rule, because there is no applicable statute of limitations. *See* 735 ILCS 5/14-101, *et seq.*

4. (Joint Brief at 66 (citing *In re October 1985 Grand Jury No. 746*, 530 N.E.2d 453, 456 (Ill. 1988) (citing *People ex rel. General Motors Corp. v. Bua*, 226 N.E.2d 6 (Ill. 1967)); *People ex rel. Daley v. Schreier*, 442 N.E.2d 185, 187 (Ill. 1982); *People ex rel. Bier v. Scholz*, 394 N.E.2d 1157, 1158 (Ill. 1979)))

request for a writ of *mandamus*. (App. 11a) This departure from precedent constitutes a failure to adhere to a state rule that had been firmly and consistently applied in the past.[5]

Second, as the Opposition also notes, with respect to the 2-1401 Petition, the Petitioners argued in the alternative that the applicable statute of limitations could be tolled under the doctrine of equitable tolling. (Joint Brief at 62) The Illinois Supreme Court reaffirmed the existence of the doctrine of equitable tolling in *Clay v. Kuhl*, 727 N.E.2d 217, 223 (Ill. 2000). Despite this rule, the majority opinion concluded that the Consul General's requests for relief were untimely, because they were not made in 1984, fourteen years *before* the Consul General was alerted to the violation of the Vienna Convention. The majority opinion did not address the application of the doctrine of equitable tolling. However, the dissenting opinions found the circumstances of this case, and the Republic of Poland's belated discovery of the death sentence imposed on its national without notice, to be extraordinary and sufficient to grant relief to the Consul General notwithstanding any applicable statute of limitation. (App. 17a, 20a) Accordingly, because the majority opinion did not apply the doctrine of equitable tolling — a doctrine it had only recently reaffirmed — in circumstances where it was clearly applicable, no adequate state bar exists to consideration of the merits in these cases.

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5. Indeed, a careful reading of the opinions issued by the dissenting members of the Illinois Supreme Court demonstrates that they determined that the importance of the case to the administration of justice presented sufficient grounds for granting relief. (App. 17a, 18a, 20a) What is more striking is that the Illinois Supreme Court proceeded to consider the merits of an appeal by the State in a different case — argued on the *same day* as this case — based *solely* upon the "general importance of the issue presented to the development of our law," despite the otherwise procedurally improper nature of the appeal. *People v. Ruiz*, 742 N.E.2d 299, 302-03 (Ill. 2000).

Third, the Petitioners also argued that the convictions and sentences in this case were void as to the Consul General because they were entered without his knowledge; the State of Illinois' violation of the Vienna Convention had the insidious effect of preventing the Republic of Poland from discovering the violation of its treaty rights. (Joint Brief at 60-61) In doing so, the Petitioners relied upon several cases, among them *People ex rel. Meyer v. Kerner*, 219 N.E.2d 617, 620 (Ill. 1966), where the Illinois Supreme Court held that where an order of the court will "vitally affect" a party's official functions, failure to bring the party before it and permit the party to be heard results in a void order.[6] The majority opinion did not apply or address these cases, despite their application to the Consul General in this instance. Accordingly, the Illinois Supreme Court's decision is not based upon an adequate state ground.

II. THE PETITIONERS CLEARLY PRESENT IMPORTANT FEDERAL ISSUES FOR REVIEW

The Petition contained a detailed discussion of the importance of the federal issues presented by this case. Petition at 14-20. In essence, the Petition asks this Court to resolve the appropriate remedy for the violation of an international treaty entered into by the United States of America with over 150 other nations, and determine whether the state and federal courts may continue to create their own remedies for violations of this treaty in clear derogation of the remedy mandated by the treaty itself. Three nations already have filed pleadings during the course of this case arguing that the annulment of a death sentence entered in violation of the treaty is mandated. This case is made all the

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6. Petitioners also cited to *Lerner v. Zipperman*, 387 N.E.2d 946, 950 (Ill. App. Ct. 1979) (court is without power or jurisdiction to enter judgment which affects interests of those not before court); *Horn v. Horn*, 125 N.E.2d 539, 543 (Ill. App. Ct. 1955) (same).

more extraordinary by the fact that a sovereign nation, the Republic of Poland, through the Consul General, is a party to the current proceedings. In addition, the United Mexican States recently has filed an *amicus* brief asking this Court to grant review. All seven members of the Illinois Supreme Court apparently believed that this case presented issues of great public importance and of great importance to the administration of justice. Justice McMorrow noted that this case addressed an "extremely serious matter under international law," while Justice Heiple, joined by Chief Justice Harrison, noted that this case raised "important issues of international relations and the rights of all persons, domestic and foreign. . . ." (App. 18a, 19a) The four-member majority of the Illinois Supreme Court also conceded that the case raised issues of great public importance and of importance to the administration of justice. (App. 11a)

The Respondents therefore appear to be alone in making the bald assertion that no important federal issue is implicated by this case. Opposition at 11-12. The Opposition makes this conclusory assertion even though it does not contest any of the following points raised in the Petition:

- The Vienna Convention, a multilateral treaty entered into between the United States of America and over 150 nations, was violated in this case;

- The Supremacy Clause requires the state and federal courts to construe the Vienna Convention consistent with its terms;

- The Vienna Convention makes customary international law applicable to determine the appropriate remedy for its violation;

- The state and federal courts have erroneously formulated their own remedies for violations of the

Vienna Convention rather than looking to international law;

- *Restitutio in integrum* is the primary remedy for a violation of international law; and

- The interpretation of the Vienna Convention of the state and federal courts to date is in clear derogation of the terms of the treaty and the remedy of *restitutio in integrum*.

See Petition at 5, 14-20. The Respondents' argument, which focuses on procedural issues, completely fails to address the merits of the Petitioner's position concerning the application of international law to this case. The issues presented clearly are significant and merit review.

In arguing no important issue is presented, the Respondents merely note that the Illinois Supreme Court's decision concerning the applicability of the procedural rules of the forum state was correct. However, if as Petitioners argue, there is no adequate and independent state ground barring review (an argument which the Respondents have failed to respond to), it is irrelevant if Illinois' procedural rules govern.

Resolution of this appeal is made all the more important when the prejudicial nature the violation of the Vienna Convention had on the defendant in this case is considered. The Respondents do not contest the allegations in the Petition regarding the prejudice suffered by Gregory Madej as a result of the violation of the Vienna Convention.[7] Accordingly, this Court is presented with a case where :

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7. In a related note, although the Respondents mention that DNA testing was recently completed in these cases, the Respondents (Cont'd)

- Defense counsel failed to conduct pre-trial investigation to defend Gregory Madej suitably at trial;

- Defense counsel failed to inform Gregory Madej of his right to decide whether or not to testify at trial, and the trial court expressly relied upon his testimony in sentencing him to death;

- Defense counsel performed absolutely no mitigation investigation and presented no mitigating evidence on Gregory Madej's behalf during sentencing proceedings; and

- Defense counsel did not disclose he was a full-time prosecutor for the State of Illinois at the time he represented Gregory Madej at his capital murder trial.

See Petition at 6-7, 20-23. Accordingly, it is clear that the violation of the Vienna Convention was prejudicial and that this case presents an appropriate vehicle to decide the appropriate standard of review under domestic law should this Court find international law does not apply.[8]

(Cont'd)

unfortunately do not disclose to the Court that, as a result of the DNA testing, the State of Illinois' *own* expert has opined that the forensic evidence utilized to convict Gregory Madej of deviate sexual assault more likely than not does not support a finding that anal intercourse occurred. Nor do the Respondents disclose that this non-existent aggravating factor was considered by the trial court in sentencing Gregory Madej to death.

8. To the extent the Respondents seek to imply during their lengthy recitation of Gregory Madej's personal history that Gregory Madej was not entitled to the protections of the Vienna Convention because of his residence in the United States, this is plainly erroneous. Opposition at 5-7. By its terms, the treaty applies to all

(Cont'd)

WHEREFORE, for the foregoing reasons, Petitioners, the Consul General and Gregory Madej, respectfully ask this Court to grant a writ of certiorari in this cause and vacate the judgment of the Illinois Supreme Court.

Respectfully submitted,

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(Cont'd)
foreign nationals. The Respondents also do not mention that young Gregory Madej's legal representation was arranged for by his parents — two immigrants with limited English language capacity that selected an inexperienced attorney with a conflict. The assistance of the Consul General would have been critical in this case.